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Lesort - direct

1 Q. And you've had ups and downs, then, throughout.

2 A. Very much so, like any business.

3 Q. Have there come times in which you have, I guess, changed
4 the business to go with the times?

5 A. I think in our business we need to constantly maintain,
6 improve, and adapt, which I think we have in the past few
7 years.

8 Q. Could you give us just some broad examples of things that
9 you've done to change the business?

10 A. One of the big ones is, the hotel was purchased by a large
11 hotel group, and they came to us and helped invest in
12 renovating our new restaurant -- pardon -- new-look restaurant.
13 It's the same restaurant, same corporation, same everything.
14 They chose to invest a substantial amount of money in our
15 space, which was helpful because we could not ever -- could not
16 have afforded it otherwise.

17 Q. OK. And in terms of the hotel, so does that mean that --
18 does that cause you to expand?

19 A. It could, two things. It could, now that we've become a
20 restaurant of a hotel of a big group called the Marriott Group,
21 it allows us to now serve the hotel and do room service, which
22 we were not able to do before. But on the other hand, the
23 trick was, we had to increase our rent in order for them to
24 invest the amount of money they were willing to invest to
25 improve our business. And we felt, the business decision was

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1 that it would give us, you know, longevity and maybe help us
2 increase our business.

3 Q. We've heard testimony that plaintiffs were employed at Opia
4 in 2005 through 2007. Is it -- would you -- who would be the
5 best person to ask regarding issues regarding money about the
6 restaurant?

7 A. I'm very involved in it, obviously, but the best person
8 would be my accountant or my controller. But I myself and
9 Antoine are both, you know, very involved in it.

10 Q. Do you remember how the restaurant was doing in 2005?

11 A. These were actually two of our best years.

12 Q. 2005 and --

13 A. 20 -- actually '06 and '07 were some of the best years.

14 Q. I think there was mention of a bonus being paid. There was
15 a bonus paid in 2006 to plaintiffs. Did you pay a bonus to
16 your employees in 2007?

17 A. Yes. We try when we can at the end of the year to give
18 bonuses. You tend to, in the restaurant business, to give
19 larger bonuses to what we call salary employees, which are
20 nontip employee. And sometime if you can and if you have good
21 tip employees, you do give a little something at the time, end
22 of year, to your tip employee as well. It's not something that
23 is done very often in the restaurant business. Again, as I
24 said, bonuses are given to salary employees.

25 Q. But in this circumstance, in 2006, the servers also were --

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1 because it was a good year --

2 A. Yes. We were able to give something to some of the servers
3 and bussers and runners who have been -- who we felt were good
4 employees and some of them have been with us for a long time.

5 Q. Did you pay a bonus in 2007?

6 A. I think we -- I think it was the last year we did -- yes, I
7 think it was the last year we did in 2007, and then
8 unfortunately we were not able to do it in '08 and '09.

9 Q. So you did not pay bonuses in '08 and '09.

10 A. No.

11 Q. Was the economy part of the reason?

12 A. Yes, very much so.

13 Q. You made a reference differentiating between tip employees
14 and nontip employees. Can you explain this issue of who -- who
15 is a tip employee?

16 A. Front of the house, anybody that deals with clients.

17 Q. Mr. Lesort, you have to assume that no one here knows that
18 what you mean by "front of the house."

19 A. "Front of the house" means, that is in contact with our
20 clients. That starts with, obviously, the server, who is
21 responsible to handle the table, down to the busser, down to
22 the runner, the person who brings the food to the table, down
23 to the bartender, who makes the drinks for the cocktails or
24 waiters or waitresses. It's a team effort that is being made.
25 It's important to understand that it's not just the server who

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1 is collecting tips. It's everyone together. And sometime if a
2 busser is not polite and not friendly or not attentive, the
3 server can also pay the price and not get a good server,
4 service. So it's important that everyone together does a
5 good -- provides good service to our clients so that the server
6 can expect and hope to have the best service possible.

7 Q. There has been testimony in this case with regards to the
8 sharing of tips. Is the sharing of tips done according to a
9 formula, or are they pooled, or something else?

10 A. Each restaurant in New York, I assume in the U.S., has
11 different formula in sharing tip. There is what's called the
12 point system. There's a percentage system. So the service is
13 collected at the end of the night, and the person responsible
14 for it, obviously the server, and then it's shared with the
15 rest of the team that helps serve the client, and it is
16 distributed accordingly to the percentages that each restaurant
17 has. I mean, each restaurant has a different formula. It's
18 true that most of the time the server will keep a majority of
19 the tip, and which is usually a little over 50, 55 percent, and
20 then the rest is distributed between the rest of the team.

21 Q. And this issue of managers, *maître d's*, can you explain,
22 what is the role of a *maître d'*?

23 A. The role of the *maître d'* is, as I explained earlier, is
24 someone who really handles -- a good part of it is greeting the
25 client, knowing our clientele. This is really the role of the

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1 *maître d'*, knowing the regulars, knowing where they like to
2 sit, what their habits are, helping eventually the server
3 serving the clients. If there are some regulars that come in,
4 we know that they have certain habits in cocktails or wine or
5 even food that they wish to have, and the role of the *maître d'*
6 is to help handling that, making that client feel special, in
7 assistance to the server, and then is also helping
8 troubleshooting if there are any issues during service; food
9 doesn't come on time dealing with the kitchen, server might
10 make a mistake, spill the drinks. So we -- it's client
11 relation. It's really the role of the *maître d'*.

12 A manager, on the other hand, is someone who has
13 management decision, which can hire or fire, eventually involve
14 scheduling, maintenance of the restaurant, and all sorts of
15 things.

16 Q. And who is responsible, in addition to yourself and
17 Mr. Blech, for the management role that you just described?

18 A. Jimena Pereyra, as we know.

19 Q. And Jimena does not share in the tips.

20 A. No, she doesn't.

21 Q. And is this issue about being called the *maître d'*, being
22 called a manager, is it just an issue of words?

23 A. Absolutely. Unfortunately, in our payroll system, for some
24 reason, the word "manager" describes and has -- all those
25 employees. It's a mistake on our part and I understand that.

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1 Unfortunately, the description of the job is different. We do
2 have different categories in terms of the payroll summary and
3 we do have dishwashers that are in the kitchen and kitchen
4 personnel that are in dishwasher categories. It does happen.

5 Q. And just to -- you indicated that you -- who actually does
6 the payroll?

7 A. It's -- the payroll is processed by our managers. I'm
8 sorry, forgive me. It's checked by our managers and then it's
9 actually processed by our controller.

10 Q. By, you mean checked by managers, you mean --

11 A. Time cards. We worked with time cards, old-fashioned-style
12 time cards.

13 THE COURT: Hold on. Let her finish her question and
14 let him finish his answer. Go ahead.

15 Q. I'm sorry. I mean those tip reports that you see. What
16 you mean is, at the end of the night, there is a tabulation and
17 that is what compiles and ends up on, what has been marked into
18 evidence, the tip reports.

19 A. Tips and payroll is processed by two people, Jim and our
20 chef. So we see Jim takes care of what we call front house,
21 meaning all tip entries and *maître d's*, and then chef takes
22 care of the back of the house. Two things are involved,
23 obviously -- tipping, which needs to be kept together and
24 reconciled on a daily basis, and then the hourly salary and
25 wages that are paid also to our wait staff and bus server and

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1 runner. And that is then provided at the end of the week on
2 Monday morning usually to our controller, who then processes
3 the other payroll through a company that we work with.

4 Q. OK. So that payroll sheet, did you create that payroll
5 sheet, or --

6 A. Our controller created that, yes.

7 Q. Your controller created it.

8 A. It's an easy way for us on a weekly basis to keep track of
9 our payroll and control our business, which is the role of
10 Antoine and I, to see all sorts of issues that we may have on a
11 weekly basis, with overtime and so on.

12 Q. Just a couple more questions in regards to just Opia in
13 general. We've heard testimony in regards to what kind of
14 people, I guess, go to Opia. There's been a lot of talk of
15 the, I guess the Wednesday-Thursday after-work drinks lounge
16 people. Would you say that that is the primary category of
17 customers that frequent Opia?

18 A. Opia happens to be located midtown, in a high-traffic area,
19 and very much a very business-oriented neighborhood. So we do,
20 Monday through Friday, get quite a bit of people working in the
21 neighborhood on financial institutions, legal field and so on.
22 So it's true that Monday through Friday we get a lot of
23 businessmen and women who come not only for lunch but come for
24 drinks and come for dinner.

25 Q. But there was testimony, I believe, at some point that

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Lesort - direct

1 families don't come to Opia. Is that correct?

2 A. We do get families. Mostly, I'll tell you, we're very big
3 on things like Mother's Day. We do a big Easter every year
4 where we have, even, games for kids that's all being played in
5 the restaurant. It's quite large. It's over 6,000 square
6 feet. So it's one of the rooms that's being used for children
7 and families. Some, we do have families that come to the
8 restaurant. It's not a dominant number of people. But
9 obviously our primary source of business is people who work in
10 the area. But we do have families coming in.

11 Q. And would you say that it's mainly men who come to Opia?

12 A. No. Actually, it's a very, very even, even probably a
13 little bit more women than men who come to the restaurant and
14 the bar.

15 Q. And the bar.

16 A. Yeah.

17 Q. Throughout the day.

18 A. Absolutely.

19 Q. And is that, I don't know, does that make a difference?

20 A. I don't know if it makes a difference.

21 Q. Different customers --

22 A. I think --

23 MR. GOLDBERG: Objection.

24 THE COURT: Hold on.

25 MR. GOLDBERG: Time frame, relevance?

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1 THE COURT: Yes. Sustained. It's not relevant. Next
2 question.

3 Q. There was a reference made to payroll, to the payroll and
4 the controller. How much does Opia spend on payroll a week?

5 A. With services, our payroll is about 20 to 24 thousand
6 dollars a week.

7 Q. And how much money do you need to, I guess, break even?

8 A. A restaurant of our size, with our fixed expenses and food
9 costs, liquor costs, and bill, needs to generate 50 to 65
10 thousand dollars a week of business in order to break even.

11 Q. In order to break even.

12 A. Correct.

13 Q. Did you break even into, I guess -- let's start going in --
14 were there any profits in 2005?

15 A. 2005 there were profits.

16 Q. Do you remember how much?

17 A. No, I don't recall now.

18 Q. 2006?

19 A. There were profits as well.

20 Q. 2007?

21 A. There was some profit.

22 Q. 2008?

23 A. No.

24 Q. 2009?

25 A. Big loss.

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1 Q. Big loss. Can you quantify the loss?

2 A. I don't think it's anyone's business, but big loss.

3 Q. Big loss. OK.

4 MS. FRIDEGOTTO: Just one moment, your Honor.

5 Q. Mr. Lesort, did you ever sexually harass Beatriz Veerman?

6 A. Never.

7 Q. Did you ever racially discriminate against Ms. Veerman?

8 A. Never.

9 Q. Did you ever sexually harass Ms. Ba?

10 A. No.

11 Q. Did you ever racially discriminate against Ms. Ba?

12 A. No.

13 Q. Did you ever fire Ms. Veerman?

14 A. No, I didn't.

15 Q. Did you fire Ms. Ba?

16 A. I did not.

17 Q. Did you ever state that they were too dark to work certain
18 shifts at your restaurant?

19 A. Definitely not.

20 Q. You just testified right now that -- withdrawn. There was
21 testimony earlier in this case that the "too dark" comment --

22 (Mr. Goldberg rose)

23 Q. -- was because you didn't think the clientele would want
24 someone that was too dark. Do you recall hearing that?

25 MR. GOLDBERG: It's OK.

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1 A. Yeah, I do remember hearing that.

2 Q. Would you say that the clientele is the same every day?

3 A. Very much so, yes.

4 Q. So would it make a difference in regards to any specific
5 day?

6 A. Not at all.

7 Q. Not at all? Thank you very much, Mr. Lesort.

8 A. You're welcome.

9 THE COURT: Mr. Goldberg, any questions?

10 MR. GOLDBERG: Yes. Thank you, your Honor.

11 CROSS EXAMINATION

12 BY MR. GOLDBERG:

13 Q. Good morning, Mr. Lesort.

14 Mr. Lesort, with respect to this company Deep Blue
15 Group, that is the company that issued paychecks to Ms. Ba and
16 Ms. Veerman, correct?

17 A. Yes.

18 Q. So according to your company's records, Ms. Ba and
19 Ms. Veerman were employees of Deep Blue Group, correct?

20 A. Yes.

21 Q. And Deep Blue Group runs the Opia restaurant. Yes?

22 A. Yes.

23 Q. And it runs the restaurant through the efforts of yourself
24 and Mr. Blech.

25 A. Correct.

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Lesort - cross

1 Q. Who are partial owners of Deep Blue Group.

2 A. Correct.

3 Q. And you draw salaries from Opia.

4 A. Correct.

5 Q. And Opia is the name on the restaurant, outside the
6 restaurant. It says "Opia."

7 A. It's called a d/b/a.

8 Q. It's a d/b/a, that's right. Opia is the d/b/a of Deep Blue
9 Group.

10 What are your projected sales for 2010?

11 A. You're asking me in gross revenues or --

12 Q. Yes, gross revenues.

13 A. 4 million.

14 Q. And in the years that Ms. Ba and Ms. Veerman worked at your
15 restaurant, as you said, a few minutes ago, there were profits.

16 A. That's correct.

17 Q. What, if you can tell me, what would Opia's typical sales
18 be, today, for example, June 15, 2010? What would you expect
19 Opia's sales to be today?

20 A. Today it really depends on -- unfortunately I don't have
21 the schedule of private events, but private events is a big
22 part of our revenue, and that can play a big impact on the
23 revenue. But without private events on a day like today, then
24 Tuesday is a day that you can generate anywhere between 6 and 8
25 thousand in a day.

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Lesort - cross

1 Q. In gross sales?

2 A. That's correct.

3 Q. And Mr. Lesort, would you agree with me that, in terms of
4 the business district where Opia is located, is it fair to say
5 that certain nights of the week, like Wednesday and Thursday,
6 can be nights when a lot of business folks like to go out after
7 work for drinks?

8 A. Business folks like to go out on any night of the week.
9 There's a higher volume of people who like to go out on a
10 Wednesday and Thursday, true.

11 Q. That's why, when I spoke to you yesterday about days that
12 might be better shifts for a cocktail waitress, we were focused
13 on Wednesday and Thursday. People, as you said, exit New York
14 City if they can on the weekend, avoid the heat, and a good
15 time to go out is Wednesday and Thursday.

16 A. But actually the clientele does not change from Tuesday to
17 Wednesday. The level and the quantity of clientele increases
18 on Wednesday and Thursday.

19 Q. And you said a few minutes ago, when Ms. Fridegotto was
20 questioning you, that you're excited, I think, you're excited
21 about your business because you're connected to the Marriott
22 hotel chain now?

23 A. We have a lot of hopes with that.

24 Q. So you hoped for success, sales, and profits at your
25 restaurant.

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Lesort - cross

1 A. That's the whole idea of opening a business today in New
2 York.

3 Q. So while 2008, 2009 may have been years where you had a
4 loss, you expect 2010 to be better than those years.

5 A. We certainly hope so.

6 Q. And you hope to have profits this year.

7 A. We hope so.

8 Q. At this point in time are you running at a profit?

9 A. Not yet.

10 Q. Not yet. But you hope to have profits this year.

11 A. That's correct.

12 Q. And as you said, you're projecting 4 million in sales.

13 A. That's correct.

14 Q. Now, we talked -- you talked to Ms. Fridegotto a couple
15 minutes ago about payroll, payroll worksheets. The payroll
16 is -- the payroll worksheet -- that's Exhibit 1 -- that's the
17 document that results in the W-2s, the tax forms for each
18 employee of the?

19 A. That's correct.

20 Q. So when I look at Plaintiff's Exhibit 1 and I see this
21 group called "management" -- and I'm not going to argue with
22 you right now about *maître d's* and managers, but there are no
23 tips listed for that group?

24 A. That's correct.

25 Q. So this payroll worksheet the results in a W-2 based on

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Lesort - cross

1 data inside it.

2 A. Yes.

3 Q. So a manager, Sean Zier, doesn't have any tips in the
4 payroll worksheet, and his W-2 is going to be the amount listed
5 on the payroll worksheet.

6 A. It should be.

7 Q. It should be, but it's not. There's no tips anywhere for
8 managers in here.

9 A. Managers, again we talked about it earlier. *Maître d's*
10 get tips. Manager does not get tips.

11 Q. OK. Is Thadee Zachariasen, was he a *maître d'* or a
12 manager?

13 A. Thadee was a *maître d'*.

14 Q. And Thadee, I'll look at this document in 032, has no tips
15 next to his name for payroll worksheet May 2 of '06?

16 A. I don't know.

17 Q. You don't know why. So in this document all of the people
18 who you say are *maître d's*, none of them have tips in the
19 payroll report, and none of them have a title in this document,
20 *maître d'*. Is that correct?

21 A. That's correct, based on the document.

22 Q. And in terms of the sales at Opia, such as the 4 million
23 projected sales for 2010, I think you said before, the front
24 line of dealing with the customers that pay that 4 million are
25 the servers. Right?

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Lesort - cross

1 A. The -- obviously the first person in touch and in contact
2 to the client are the servers, correct.

3 Q. And in the case of '05, '06, and '07, when you had profits
4 at the restaurant, Ms. Ba and Ms. Veerman were partially
5 responsible for those successes, for the efforts.

6 A. They were part of our team, that's correct.

7 Q. And in '08 and '09 when you say you had losses, you didn't
8 have Ms. Ba or Ms. Veerman working at the restaurant.

9 MS. FRIDEGOTTO: Objection, relevance, your Honor.

10 Q. Right? Am I correct? They weren't there?

11 THE COURT: Sustained. All of it has been
12 established. Asked and answered.

13 MR. GOLDBERG: Thank you, Mr. Lesort.

14 THE COURT: Thank you, Mr. Lesort. You may stand
15 down. Any other questions?

16 MS. FRIDEGOTTO: I have questions, your Honor.

17 THE COURT: Hold on. Go ahead, ask your questions.
18 Ask them.

19 REDIRECT EXAMINATION

20 BY MS. FRIDEGOTTO:

21 Q. Mr. Lesort, you said that you're projecting 4 million for
22 2010.

23 A. Yes.

24 Q. But you can't guarantee --

25 A. Of course not.

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Lesort - redirect

1 Q. -- you're going to make a profit.

2 A. I wish.

3 Q. There's unknown things that can happen? So that 4 million,
4 is that fair to say it's an estimate?

5 A. Absolutely.

6 Q. And that \$65,000 that you need each week to break even,
7 that is for 2010?

8 A. That's based on our current expenses and payroll.

9 Q. That's based on your current --

10 A. On our current expenses and payroll yes.

11 Q. I did a little bit of math. 65 times 52 weeks in a year,
12 that means that you were looking to spend \$3,380,000 just to
13 break even. That's how much you need to make.

14 A. A restaurant, in the industry, depending on the ratio of
15 food and liquor, needs to -- will, when it does well, will net
16 profit anywhere between 12 to 15 percent. That's the net
17 profit of the restaurant business. Whether it's in New York,
18 in Los Angeles, in Washington. You can look at any statistic,
19 national statistic. This is a business which is a
20 penny-and-dime business, 12 to 15 percent.

21 Q. And the profits, if there are any --

22 A. They go directly to my investors.

23 Q. They go directly to?

24 A. My investors.

25 Q. And you indicate --

1 A. In order to pay them back.

2 Q. Have they been repaid yet, sir?

3 A. No, they have not.

4 THE COURT: Asked and answered.

5 Q. Thank you very much, Mr. Lesort. I have no further
6 questions.

7 THE COURT: You may stand down.

8 (Witness excused)

9 THE COURT: Are there any other witnesses for the
10 defendant?

11 You want a minute to consult?

12 MS. FRIDEGOTTO: Just a minute to consult. And I
13 would like to see the documents.

14 THE COURT: OK. Yes, they are there.

15 MS. FRIDEGOTTO: May I step outside for them, please?

16 THE COURT: Well, I'll tell you what. We'll take a
17 ten-minute recess now.

18 Folks, we'll take ten minutes. I anticipate we're
19 winding down based on what I was told. I expect that when you
20 come back, if we have any more witnesses, it will be brief. I
21 have these instructions ready to read. And we'll get the case
22 submitted to you. But if you want to take a little break, have
23 a cup of coffee or use the restroom, we'll be back at 12:10.
24 Remember the Court's admonition. We will be in recess for ten
25 minutes.

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1 (Jury not present)

2 THE COURT: All right. The jury is not present,
3 counsel and the parties are present.

4 MR. KRAUS: We would ask for some time to review the
5 tax records and determine what, if anything we need to do.

6 THE COURT: No, I'm not going to delay this,
7 Mr. Kraus. These things were ordered and Mr. Goldberg said
8 this morning he had them. There are two counsel here. You
9 could have been looking at them during the time she was asking
10 questions.

11 MR. KRAUS: We didn't get them until --

12 THE COURT: Mr. Goldberg said he had them this
13 morning. He said he had them. He's been referring to them.

14 MR. KRAUS: He's --

15 THE COURT: Mr. Kraus, I'm not delaying this. The
16 jury is not going to be kept waiting while you look over these
17 records. He's been here since this morning. He announced they
18 were here this morning. So take a look at them. He made one
19 small correction, he even referenced them and said he made a
20 correction.

21 MR. KRAUS: I don't know what the correction is. We
22 have haven't gotten it.

23 THE COURT: He said he made one correction, I think to
24 2007 on Ms. Veerman's W-2. He said one was wrong. And
25 Ms. Fridegotto acknowledged that, shook her head when

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1 Mr. Goldberg said it. So that for the hour and a half we've
2 been asking questions, Ms. Fridegotto has, you could certainly
3 have been looking at those at counsel table.

4 MR. KRAUS: If I had them, I would.

5 THE COURT: We're going round and round. If you could
6 have had them. You could have asked Mr. Goldberg, hand them
7 over four feet to me. I'm not delaying this. Ten minutes is
8 all we have.

9 (Recess)

10 MS. FRIDEGOTTO: Your Honor, I would like to ask for a
11 sidebar.

12 THE COURT: Well, we don't need it. Nobody is here.
13 Let's go back on the record in the matter of Veerman v. Deep
14 Blue. Counsel are present. Plaintiffs are present.
15 Defendants are just outside. The jury is not present.

16 Yes.

17 MS. FRIDEGOTTO: I just went through the discovery
18 that was previously provided. And I was never given W-2s for
19 2007, for Ms. Ba. And now all of a sudden, what was originally
20 shown to the jury as being an exhibit as to the amount of money
21 that she made for the year 2007 is off by \$20,000. It goes up
22 to \$20,000 instead of being 7. And I have all the discovery.

23 THE COURT: I'm sorry. I'm not following you. You're
24 saying she made \$20,000 in '07?

25 MS. FRIDEGOTTO: She made \$20,000, and instead, what

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1 was shown to the jury, she was shown as having made 7. So it's
2 not a small error. It is \$13,000.

3 And not only that, but I have just gone through the
4 discovery. I have every pay stub that she ever made from Opia
5 pretty much. She submitted all of them, but I was never
6 given -- I was given W-2s for the year 2008, and they match up.
7 I mean, I did the math roughly in my head. I did the math
8 roughly in my head. But one is for approximately 5 and change
9 and one is approximately 6 and change. So this 11 number, I'm
10 OK with for 2008. Ms. Veerman submitted --

11 THE COURT: I don't need to know what you're OK with.
12 What are you asking? You want to put the plaintiff on and ask
13 her whether the W-2s reflect her income for the respective
14 years? That's why we have trials. If you disagree with the
15 numbers, put her on. Offer the W -- offer the tax return,
16 redacted with her Social Security number out. And then you can
17 test these figures.

18 MR. GOLDBERG: And as I said, I apologize for the
19 13,000 oversight. The W-2s are here. And we reduced the
20 number by 13 now. I sincerely apologize.

21 THE COURT: OK. He flagged that. He flagged that at
22 the time that he produced these this morning.

23 MS. FRIDEGOTTO: By, just -- he flagged it now.

24 THE COURT: No, no. He said earlier that he was going
25 to have to adjust the number. He didn't tell me the amount.

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1 But he said one of them was wrong and a W-2 was wrong.

2 MS. FRIDEGOTTO: All right. Well, I would like to
3 remove 43-A from evidence.

4 MR. GOLDBERG: We just redacted the interest and we
5 reduced the math. And I will tell the jury in closing that we
6 made a mistake and I apologize.

7 THE COURT: I don't know that that's necessary. Why
8 don't we just -- why don't we enter into -- why don't you enter
9 into a stipulation that the amount was erroneous up to this
10 point, the error has been discovered, plaintiffs acknowledge
11 that and are not asking for that amount as to 2007.

12 MR. KRAUS: I think we would still like it removed
13 from evidence. It's improper.

14 THE COURT: OK. He's redacted it. The chart won't be
15 shown again. Don't use the chart with the wrong number. Take
16 a look at the exhibit. He has corrected the exhibit.

17 MR. GOLDBERG: I gave a copy to Ms. Fridegotto with
18 the reduced number so that she would have the exact document as
19 corrected.

20 MR. KRAUS: Our objection stands. Obviously it's up
21 to the Court to do what it sees best.

22 THE COURT: Yes. I think what I'll do is allow the
23 redactions to be made. I'll explain to the jury that there was
24 a mistake made. And I will have you explain what the mistake
25 was and tell them that the document has been corrected at this

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1 point.

2 If defendants want to call the plaintiffs on the
3 matter of how much they made or put on their tax returns, they
4 are free to do that. That's how I resolve it.

5 Anything else?

6 MS. FRIDEGOTTO: Not at this time, your Honor.

7 THE COURT: OK. Call the jury.

8 THE CLERK: Yes, your Honor.

9 THE COURT: Are your clients still here? They're
10 coming back in?

11 MR. KRAUS: Yes. I'll get them, your Honor.

12 THE CLERK: Jury entering.

13 (Jury present)

14 THE COURT: All right. Once again, all members of the
15 jury are present. Counsel and the parties are present.

16 Ladies and gentlemen, it sometimes happens in cases
17 with lots of paperwork, as this case has, that some mistakes
18 are made. Apparently counsel had discovered a mistake on one
19 of the documents that was admitted in evidence already. The
20 mistake is going to be corrected on the exhibit before you,
21 before it's back in the jury room with you. Mr. Goldberg
22 acknowledges the mistake and will tell you what it is now and
23 correct that.

24 Mr. Goldberg?

25 MR. GOLDBERG: Thank you, your Honor. On the Ms. Ba

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1 damages chart, we made a mistake because we left out by
2 accident the W-2 form, and it was discovered this morning. And
3 I adjusted Ms. Ba's damages amount downwards by about \$13,000
4 because of the additional W-2s that were located. I apologize.
5 I made the correction. I have the W-2 forms for Ms. Fridegotto
6 here. And I apologize for the mistake, your Honor.

7 THE COURT: All right. So you saw some charts. I
8 think they were used during the examination of witnesses. The
9 charts won't be in evidence. They were demonstrative. But
10 you'll have the actual exhibit that the chart was blown up
11 from, and that chart has been corrected to reflect what you
12 believe is the accurate amount of earnings for 2007 by
13 Ms. Veerman?

14 MR. GOLDBERG: Yes, your Honor. Thank you.

15 THE COURT: OK. So with that explanation, defendants
16 may proceed at this point.

17 MS. FRIDEGOTTO: I would like to call Ms. Ba back up
18 to the stand, please, your Honor.

19 THE COURT: All right. Ms. Ba.

20 You are still under oath, Ms. Ba.

21 KHADUETOU BA,

22 called as a witness by the defendants,

23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MS. FRIDEGOTTO:

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Ba - direct

1 Q. Good afternoon, Ms. Ba.

2 A. Good afternoon.

3 Q. You previously testified on Friday, last week, that you
4 sustained a loss of \$47,447 in lost earnings as a result of
5 your alleged firing from Opia. Isn't that correct?

6 A. Correct.

7 Q. And now, we have made a correction to your lost earnings
8 claim, and it now shows that -- and you had previously actually
9 testified that you had earned \$7,300 in 2007; is that correct?

10 A. That's what was on the chart.

11 Q. OK. But as of now we have just amended the chart, and so
12 now it has actually come out that you made \$20,366 in 2007. Is
13 that correct?

14 A. Yeah. I gave all the W-2 form to my lawyer, so...

15 Q. So you earned \$23,366 in 2007, is that correct?

16 A. If that is what the W-2 form says, that's correct.

17 Q. All right. And so just to refresh, in 2006 you made
18 \$27,206 at Opia?

19 A. Yes.

20 Q. So your lost earnings as previously testified is incorrect;
21 is that correct?

22 A. It was a mistake on the part of my lawyers, and they
23 apologized for it, so...

24 Q. Thank you very much.

25 A. Thank you.

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Ba - direct

1 MS. FRIDEGOTTO: I have no further questions and --

2 THE COURT: Any questions of Ms. Ba on this?

3 MR. GOLDBERG: No. No questions, your Honor.

4 THE COURT: OK. Thank you, Ms. Ba. You may stand
5 down.

6 THE WITNESS: Thank you.

7 (Witness excused)

8 THE COURT: Next, Ms. Fridegotto.

9 MS. FRIDEGOTTO: I think, your Honor --

10 THE COURT: Defendant rests.

11 MS. FRIDEGOTTO: Yes.

12 THE COURT: OK. Any other evidence on behalf of the
13 plaintiffs at this point?

14 MR. GOLDBERG: No, your Honor. Plaintiff rests.

15 THE COURT: All right. Ladies and gentlemen, the
16 evidence is complete at this point. As I projected for you, I
17 have some instructions that I have settled with the parties
18 now. I'm going to give you these instructions. We have
19 narrowed down the verdict forms to four forms. And the forms
20 track the claims that the plaintiffs have made in this case.
21 And I will explain these verdict forms for you right before you
22 retire to deliberate.

23 But for now it's my duty to instruct you on the law.
24 You will then hear summations from counsel. Yesterday
25 afternoon I spoke with counsel about how long they intended to

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1 address you in their closing arguments. Both lawyers said no
2 more than 45 minutes, probably less. So sit back, relax.
3 You'll hear the instructions. You'll hear summations of
4 counsel. And then we'll do what I've been promising for
5 several hours now; we'll give this case over to you for
6 decision.

7 Members the jury, now that you have heard all of the
8 evidence, it is my duty to instruct you on the law of the case.
9 As I have told you several times, this very copy of
10 instructions will accompany you into the jury room when you
11 deliberate.

12 Because the instructions are central to the verdict
13 that you reach, along with your findings of fact, I'm required
14 to read these to you in open court. It's a signal of the
15 importance of the principles of law.

16 You must not infer from the instructions nor from
17 anything I have said nor done during the course of the trial
18 that I have any opinion regarding the evidence or what verdict
19 you should reach. As I explained to you last Friday, this is a
20 matter entirely for you. The eight of you are the judges of
21 the fact. I have no function in that regard.

22 It's your duty to find the facts from all the evidence
23 in this case and then, to those facts, apply the law as I give
24 it to you. In deciding this case, you must follow the law,
25 whether you agree with it or not, and in deciding this case,

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1 you should not be influenced, you should not base a decision on
2 such things as personal likes or dislikes, opinions,
3 prejudices, sympathy, subjective factors. Instead, you have to
4 decide the case solely on the basis of the evidence before you.
5 Remember, last Friday when you stood up and I told you this is
6 a little like church, all of you took an oath promising that
7 you would decide the case based on the evidence and the law.
8 And we expect you to hold to that oath.

9 You should decide the case as to each plaintiff and
10 each defendant separately. Unless otherwise stated, these
11 instructions apply to all parties. And in following these
12 instructions, you should follow all of them and not single out
13 some and ignore others; they are all equally important.

14 I want to go back over the claims that are at issue
15 for you to decide in this case. Now that all the evidence has
16 been received, let me give you a brief summary of the positions
17 of the parties. These are the things that you must decide.

18 Beatriz Veerman and Kadia Ba were servers at a
19 restaurant called Opia in Manhattan. Opia is owned and managed
20 by Frederick Lesort and Antoine Blech through a company called
21 Deep Blue Group. Ms. Veerman and Ms. Ba have brought claims
22 against Opia, Deep Blue Group, Mr. Lesort, and Mr. Blech
23 relating to their employment while they were at Opia.

24 The first of these claims is as follows: Ms. Veerman
25 and Ms. Ba allege that they were sexually harassed while they

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1 were at work at Opia and they were required to work in a
2 sexually hostile work environment. They allege that Mr. Lesort
3 and Mr. Blech participated in the sexual harassment by verbally
4 and physically harassing them. The defendants, although having
5 no burden of proof as to any claim made by the plaintiffs, deny
6 that any sexual harassment took place, and they also deny that
7 the plaintiffs were forced to work in a hostile work
8 environment.

9 Second, Ms. Veerman and Ms. Ba allege that Opia and
10 Deep Blue and Mr. Lesort and Mr. Blech discriminated against
11 them by giving them less desirable work shifts than other
12 workers who were not of their race, color, or national origin,
13 and that they were harassed and discriminated and discharged
14 based on their race and their color and their national origin.
15 Again, the defendants, having no burden of proof as to any
16 claim made by the plaintiff, nonetheless deny these
17 allegations. They contend that they did not discriminate
18 against Ms. Veerman and Ms. Ba because of their race, their
19 color, or their national origin. They further contend, the
20 defendants do, that the plaintiffs were assigned shifts based
21 on their availability, their experience, their seniority, and
22 their capability.

23 Third, Ms. Veerman and Ms. Ba allege that Opia and
24 Deep Blue and Mr. Lesort and Mr. Blech unlawfully retaliated
25 against them and terminated their employment after they

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1 complained about the discrimination against them, and Ms. Ba
2 was retaliated against and discharged after she opposed their
3 demand to pay an unpaid customer bill in violation of New York
4 State labor law. Again, the defendants, having no burden of
5 proof as to any claim made by the plaintiffs, deny these
6 allegations. The defendants contend that Ms. Ba walked out of
7 Opia during the middle of her shift after being spoken to about
8 a disputed credit card charge. And the defendants contend that
9 Ms. Veerman was not fired but instead was suspended for missing
10 a shift on Sunday, May 13, 2007 and for insubordination.

11 Finally, Ms. Veerman and Ms. Ba allege that Opia and
12 Deep Blue, Mr. Lesort and Mr. Blech, unlawfully took away 5
13 percent of Ms. Veerman and Ms. Ba's tips, in violation of New
14 York State labor law. Again, the defendants, who do not have
15 any burden of proof as to this claim, deny the allegations.

16 When a party has the burden of proof on a claim or a
17 defense or an issue, that means that the party must persuade
18 you that that claim, defense, or issue is true by a
19 preponderance of evidence. Preponderance of evidence means
20 that the claim, issue, or defense is more probably true than
21 not true. This is a simple tilting of the scales, convincing
22 you by 51 percent or more.

23 The plaintiffs have the burden of proof in this action
24 to prove each and every one of the elements that they claim
25 brought by a preponderance of the evidence. You should base

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1 your decision on all the evidence regardless of which party
2 presented.

3 Keep this in mind too. This is an important
4 distinction that I made at the beginning, I reiterate now.
5 It's the distinction between what is evidence and what is not
6 evidence. Evidence consists of sworn testimony from the
7 witness stand. There are a number of documents and papers and
8 some photographs that have been received in evidence. Anything
9 that's been received in evidence in tangible form is also
10 evidence. And then any facts which the lawyers have agreed or
11 stipulated. I don't think we've had any stipulation in this
12 case. We have had a correction and a concession which you can
13 consider as proof to hear at the end.

14 In contrast to these three categories of evidence,
15 these are things that are not evidence. The arguments and the
16 statements by lawyers are not evidence. Remember what I said.
17 Wherever Mr. Goldberg and Ms. Fridegotto were in '06 and '07,
18 they weren't in Opia. They didn't know what was going on
19 there. They weren't getting drinks or being served or
20 observing what's going on. So they have had to reconstruct
21 this case. And they are not witnesses to what happened. They
22 have no historical connection to the events. You heard from
23 people who did.

24 So I say that not to deprecate the lawyers or to tell
25 you they are unworthy of consideration of the things they are

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1 saying, but just to point out the important distinction. They
2 weren't there. They're not firsthand involved in any of this.

3 Questions and objections by the lawyers likewise are
4 not evidence. Throughout the trial, the lawyers have made
5 objections when they thought they are appropriate and I have
6 ruled on them. You are not to be influenced by any of the
7 objections or by the Court's rulings on them.

8 A couple of times I told you to disregard testimony.
9 Something has been said, you know, a couple of times we had
10 people talking over each other and something was blurted out or
11 something was nonresponsive and I struck it and instructed you
12 at the time not to consider that. And that's not to say that
13 you're going to forget that certain things were said. But
14 anything that you've been instructed to disregard or that has
15 been stricken, don't let that play a part in your decision in
16 this case, your deliberations.

17 Finally, I don't think this has happened because you
18 would have notified me, but anything that you may have heard
19 somebody say or you may have learned while court was not in
20 session is not evidence in this case. I haven't sequestered
21 you. I haven't forbidden you from looking at the newspaper or
22 the TV, but the point is, we want all eight of you to be on the
23 same page and to decide this case on the basis of the same
24 evidence, which is what occurred here in this courtroom.

25 Remember that evidence will be direct or

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1 circumstantial. Direct evidence is direct proof of a fact,
2 such as testimony by a witness about what that witness
3 personally saw or heard or did.

4 In contrast, circumstantial evidence is indirect
5 evidence. It's evidence of one fact from which you can infer
6 another fact. You remember my story about the jet flying over
7 and how that could be proved somebody could say how we looked
8 up and saw, heard the engines, somebody else could say, no, we
9 never saw the jet nor heard the engines, but we saw a vapor
10 trail that was starting to break up, that was in the sky and
11 from that you could infer that a jet had flown over.

12 (Continued on next page)

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1 THE COURT: The point is both direct and
2 circumstantial evidence are competent ways of proving facts and
3 ultimately it is up to the eight of you to decide how much
4 weight to give any particular item of evidence, whether it is
5 direct or circumstantial.

6 Here is an important instruction. It has to do with
7 the credibility of witnesses.

8 I predicted to you from the beginning that there was
9 going to be a confrontation of versions, a confrontation of
10 evidence and you would have to sort it out. That's why we are
11 having this trial because the parties disagree on what happened
12 here. They want eight of you conscientious people to apply
13 judgment and experience and to give them a verdict as to how
14 this thing happened, what happened here.

15 In doing so, you may have to decide which testimony to
16 believe and whatnot to believe. You can believe everything a
17 witness says or part of it or none of it at all.

18 Here are some non-exclusive list of factors to take
19 into account when you evaluate the testimony of the witnesses
20 that you heard.

21 First, ask yourself what opportunity and ability did
22 that witness have to see or hear or know the things that the
23 witness was testifying about?

24 Second, what is the degree of the witness' memory or
25 the condition of the witness' memory? Is it good or is it

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1 sketchy.

2 Third, what was the witness' manner while testifying?

3 Did you pick up on anything based on your instincts as
4 human beings in your judgment and experience in the way the
5 witness testified, the way something was said or the mannerism
6 of a witness while he or she was testifying.

7 Ask yourselves also did the witness have an interest
8 in the outcome of the case, or does the witness have any
9 apparent bias or prejudice that would cause me to distrust the
10 testimony?

11 Is there other evidence in the case that contradicts
12 the witness' testimony?

13 Ask yourselves also does the witness' testimony seem
14 reasonable to me in light of all of the evidence?

15 Then finally, any other factors that the eight of you
16 think bear on believability.

17 This isn't an exclusive list. There are other factors
18 that weigh in the calculus here.

19 Remember also that the weight as to a fact doesn't
20 necessarily depend on how many witnesses testify about it. You
21 can be persuaded by the testimony of a single witness or
22 alternatively you can reject the testimony of many witnesses if
23 it doesn't have the ring of truth in your judgment.

24 Each plaintiff in this case claims that she was
25 treated less well than other employees because of her section

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1 by the defendant Opia Restaurant and by the defendants
2 Frederick Lesort and Antoine Blech.

3 Specifically, each plaintiff claims that because of
4 her sex, she was subject to a manager or supervisor sexual
5 harassment, sexual advances, requests for sexual conduct or
6 other verbal or physical conduct of a sexual nature, and that
7 the defendant Opia restaurant took tangible employment actions
8 against her for declining or refusing those advances.

9 To succeed on this claim of sexual harassment against
10 the defendant Opia Restaurant, the plaintiffs have to persuade
11 you by a preponderance of evidence that the following occurred:

12 First, they have to persuade you that Mr. Blech or Mr.
13 Lesort or some other manager or supervisor of the Opia
14 Restaurant subjected them to unwelcomed sexual advances that
15 were sexually motivated, based on sex and, second, that their
16 rejection of those advances affected an aspect of their
17 employment. In other words, that were it not for their
18 rejection of these sexual advances they would not have been
19 discharged from employment.

20 A sexual advance means something that is unwelcome if
21 it is uninvited and offenses or unwanted. The advances here
22 must be proved to be unwelcome advances and for the plaintiffs
23 to prove that they have to show they were not invited, they
24 were offensive to them and they were unwanted.

25 The plaintiff need not show that the rejection of the

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1 advances was the only or the predominant factor that motivated
2 the defendants.

3 If you find that either Mr. Lesort or Mr. Blech
4 subjected either plaintiff to unwelcome sexual advances as I
5 have described, then you may find that Mr. Lesort or Mr. Blech
6 is personally liable if by a preponderance of evidence you find
7 that they participated in conduct that gave rise to the claim
8 that I just described, or if they attempted to aid and abet it,
9 which means help it or assist it, help the person or assist the
10 person engaged in that conduct in some way.

11 You may also find for the plaintiff against the
12 defendant Opia Restaurant if you find, again, by a
13 preponderance of evidence that either Mr. Lesort or Mr. Blech
14 or some other manager or supervisors subjected them because of
15 their gender to sexual advances, requests for sexual conduct or
16 other verbal or physical sexual conduct of a sexual nature that
17 altered the conditions of their employment, that the conduct
18 was unwelcomed and that the conduct created a sexually abusive
19 or hostile work environment.

20 The plaintiffs have to show that the conduct was
21 severe or pervasive enough to create an environment that the
22 plaintiffs themselves believed and perceived to be hostile or
23 abusive and that a reasonable person would also have perceived
24 the climate to have been hostile or abusive.

25 If you find for the plaintiffs on their claim of

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1 hostile work environment, you must determine by a preponderance
2 of the evidence whether the conduct was sufficiently severe or
3 persuasive that it altered the terms or conditions of their
4 employment. Your determination should consider the totality of
5 the circumstances, including the nature of the unwelcomed
6 sexual acts or the words, how frequent the harassing conduct
7 was, if any, the severity of the conduct, whether the conduct
8 was physically threatening or humiliating or merely offensive
9 utterances, whether it unreasonably interfered with the
10 plaintiff's work performance and whether it affected the
11 plaintiff's psychological well-being.

12 If you find either Mr. Lesort or Mr. Blech subjected
13 either plaintiff to sexually abusive or a hostile work
14 environment as I have described it, then you may find Mr.
15 Lesort or Mr. Blech personally liable if, once again by a
16 preponderance of evidence, you find that either one
17 participated in the conduct that gives rise to the claim or
18 that either one assisted, helped somebody who did engage in the
19 offensive conduct.

20 Each plaintiff also claims that on the basis of race
21 and color and national origin she was discriminated against and
22 that she was treated less well than other employees of a
23 different race, color or national origin.

24 In other words to find for the plaintiffs on this
25 claim, you must determine, once again by a preponderance of

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1 evidence, two things:

2 First, you must determine that during the time that
3 plaintiffs were employed by the Opia Restaurant that an
4 employee or an agent of the employer subjected them to
5 discriminatory conduct based on their race or their color or
6 their national origin, and that that discrimination altered the
7 terms and conditions of their employment.

8 Second, you must determine, again by a preponderance
9 of evidence, that either a manager or a supervisor of the Opia
10 Restaurant engaged in the conduct or knew of the conduct and
11 that the defendant Opia Restaurant acquiesced in the conduct,
12 or failed to take appropriate action to stop it.

13 One way an employer can treat an employee less well
14 than other employees is to deny that employee desirable work
15 schedules.

16 The plaintiffs need not show that their race or their
17 color or their national origin was the only or the predominant
18 factor that motivated the defendant's discriminatory conduct.
19 If you find that either Mr. Lesort or Mr. Blech subjected
20 either plaintiff to the conduct as I've just described it, then
21 you may find Mr. Lesort or Mr. Blech personally liable if by a
22 preponderance of evidence you find that either one participated
23 in conduct giving rise to the claim or they helped someone who
24 was actually engaged in that conduct, a concept called aiding
25 and abetting.

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1 Each plaintiff also accused the Opia Restaurant and
2 the defendants Mr. Lesort and Mr. Blech of unlawfully
3 retaliating against her for engaging in protected activity,
4 namely, for opposing or objecting to or complaining about the
5 unlawful discrimination or harassment based on sex and for
6 opposing or objecting or complaining about the unlawful
7 discrimination or harassment based on color or race or national
8 origin.

9 To prove illegal retaliation the plaintiffs must
10 persuade you by a preponderance of evidence that while they
11 were employed at the Opia Restaurant they opposed or objected
12 to or complained about unlawful discrimination or harassment.

13 Second, that they were discharged or that they were
14 denied equal shifts because of their complaints.

15 Third, that the defendant knew about the plaintiff's
16 opposition, knew about their objection or their complaints and
17 that, fourth, the defendants would not have denied them equal
18 shifts, would not have discharged them but for their opposition
19 and objection to the complaints.

20 A plaintiff is not required to prove that her
21 complaint had merit in order to prove that she was retaliated
22 against.

23 In this case each plaintiffs alleges that the
24 defendant denied her equal shifts and later discharged her for
25 opposing and objecting to and complaining about unlawful

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1 discrimination and harassment. Once again, the plaintiffs need
2 not show that retaliation was the only or predominantly factor
3 that motivated the defendants.

4 If you find that either Mr. Lesort or Mr. Blech
5 subjected either plaintiff to the conduct that I just
6 described, then you may find them personally liable if, once
7 again, you find by a preponderance of evidence that they
8 participated in that conduct or they aided and abetted the
9 conduct somehow.

10 If you determine that during the time the plaintiffs
11 were employed by the Opia Restaurant an employee or agent of
12 the employer who exercised managerial or supervisory
13 responsible to the restaurant subjected them to discriminatory
14 conduct based on race, color or national origin as I just
15 described, you must then determine by a preponderance of the
16 evidence whether the conduct was sufficiently severe or
17 persuasive such that it altered the terms and conditions of
18 employment and created an abusive working environment.

19 Again I tell you, your determination should be based
20 on the totality of circumstances as it has been described in
21 the evidence, including, among other things, the frequency of
22 the harassing conduct, the severity of the conduct, whether the
23 conduct was physically threatening or humiliating or merely an
24 offensive utterance or whether it unreasonably interfered with
25 the plaintiff's work performance.

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1 If you find either that Mr. Lesort or Mr. Blech
2 subjected the plaintiffs to the conduct I just describe, you
3 may find them personally liable if than convinced by a
4 preponderance of evidence that they engaged in the conduct or
5 they aided and abetted it.

6 Both plaintiffs accuse the defendant company and the
7 individual defendants, Mr. Lesort and Mr. Blech, of unlawfully
8 discharging and discriminating against them on the basis of
9 race and color and national origin.

10 To find or either plaintiff on this claim, you have to
11 determine by a preponderance of evidence that the defendant
12 terminated the employment of the plaintiffs and that it was on
13 account of the plaintiff's race, color or national origin, that
14 that was the motivating factor giving rise to the defendants'
15 decision.

16 The plaintiffs don't have to show that the
17 consideration of race or color or national origin was the only
18 factor or the predominantly factor that motivated the
19 defendants' discriminatory conduct.

20 When you consider this evidence, the question is not
21 whether the defendant showed poor or erroneous judgment. An
22 employer is entitled to make an employment decision for a good
23 reason, a bad reason or for no reason at all, so long as the
24 decision was not motivated by unlawful discrimination.

25 If you find that either Mr. Lesort or Mr. Blech

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1 subjected either plaintiff to the conduct I just described, you
2 may find them personally liable if, again, by determining by a
3 preponderance of evidence that they participated in the conduct
4 or they aided and assisted it.

5 The plaintiffs are not required to produce direct
6 evidence of the defendants' unlawful motive. You, rather, may
7 infer knowledge and/or motive as a matter of reason and common
8 sense from the existence of other facts; for example,
9 explanations that were given that you find were really
10 pretextual. A pretextual reason is not the real reason that an
11 action was taken.

12 Ms. Ba has made an individual claim against the
13 defendants for unlawfully retaliating against her by
14 discharging her for engaging in protected activity, namely, for
15 opposing and objecting or complaining about the defendant's
16 demand that she pay an unpaid customer bill in violation of a
17 state labor law.

18 It would be a violation of state labor law to require
19 Ms. Ba to pay an unpaid customer bill. It would likewise be a
20 violation of state labor law for an employer to retain any
21 portion of an employees tips or gratuities.

22 To prove illegal retaliation in this case, Ms. Ba must
23 persuade you by a preponderance of evidence while she was
24 employed at the Opia Restaurant she complained about the
25 defendant's demand that she pay an unpaid customer bill and the

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1 defendant knew about her opposition and objection and complaint
2 and that the defendant would not have discharged her in the
3 absence of her complaint about that subject. The plaintiff is
4 not required to prove that her complaint had merit in order to
5 prove the retaliation claim.

6 In this case plaintiff Ba alleges that the defendants
7 unlawfully discharged her because she opposed and objected to
8 and complained about the defendants' allegedly unlawful demand
9 that she pay an unpaid customer bill in violation of state law.

10 Ms. Ba also claims that she was either fired or
11 constructively discharged from her employment at Opia. To
12 prove that she was constructively discharged from employment,
13 Ms. Ba must show that the defendants, by taking illegal or
14 discriminatory acts, made her working conditions so difficult
15 that a reasonable person in her position would have felt
16 compelled to resign.

17 When here a company is involved in a case it may act
18 only through natural persons, that is, its agents or employees.
19 What that means is for Opia to be involved it has to operate
20 through its agents or employees, it's managers and employees
21 and the like and, in general, any agent or employee of the
22 company may bind the company by his acts and statements made
23 while acting within the scope of his authority at the company
24 or within the scope of his duties as an employee of the
25 company.

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1 In this case the defendant Opia Restaurant acts
2 through managerial and supervisory employees. This would
3 include, for example, Mr. Lesort and Mr. Blech as managers,
4 associate managers and any assistant managers of the company.

5 Therefore, if you find that Mr. Lesort or Mr. Blech as
6 managers or any other supervisor of the Opia restaurant acted
7 in a certain way, then you will also find that Opia Restaurant
8 acted in that way.

9 It is the duty of the court to instruct you also about
10 the measure of damages. By instructing on damages I don't mean
11 to suggest for which party your verdict should be rendered, I'm
12 required to tell you how damages are measured.

13 If you find for the plaintiff on a claim against the
14 defendants, then that particular plaintiff for whom you find is
15 entitled to damages from the defendant based on the claim. In
16 this case the damages may include back pay that the plaintiffs
17 would have earned had the defendant not acted unlawfully as
18 well as lost future earnings.

19 Uncertainties about the amount of lost compensation to
20 be awarded should be resolved in the plaintiff's favor. If you
21 determine that a defendant has unlawfully retained plaintiff's
22 gratuities or tips that the plaintiff is entitled to, then
23 damages in the amount of the retained gratuities or tips is
24 appropriate.

25 If you find for a plaintiff on a claim against the

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1 defendant, then you have to determine whether she is entitled
2 to damages in an amount that is fair to compensate for that
3 claim. You may award compensatory damages only for injuries
4 that the plaintiffs proof were caused by the defendants'
5 allegedly wrongful conduct.

6 The damages that you award must be fair compensation,
7 no more and no less. You may not award damages based on
8 sympathy or speculation or guesswork. On the other hand, the
9 law does not require that the plaintiffs prove the amount of
10 losses with mathematical precision, but only with as much
11 definiteness and accuracy as the circumstances permit.

12 You may not consider the cost to a plaintiff for
13 hiring a lawyer. Attorneys' fees are determined by the court
14 if necessary and may not be included in your damages award.

15 You may award compensatory damages also for emotional
16 pain and suffering, for inconvenience or mental anguish if you
17 find that those conditions were caused by the defendants' sex
18 based harassment or hostile work environment or for race, color
19 or national origin based harassment, hostile work environment
20 or discharge or for retaliation or for aiding and abetting any
21 of the unlawful conduct that I have described.

22 No evidence of the monetary value of these intangible
23 things, such as pain and suffering, has been or need be
24 introduced in evidence. There is no exact standard for fixing
25 the compensation to be determined for these elements of damage.

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THE CHARGE

1 In addition to actual damages, you may also award
2 plaintiffs punitive damages to punish the defendant for some
3 extraordinary misconduct and to serve as an example or a
4 warning to others not to engage in such conduct.

5 If you find in favor of a plaintiff and against the
6 defendant and if you find by a preponderance of evidence that
7 the defendant's action was motivated by an evil motive or
8 intent that the defendant was callously indifference to the
9 plaintiff's rights, then in addition to any other damages to
10 which you find the plaintiff is entitled you may, but are not
11 required to, award the plaintiff with an additional amount as
12 punitive damages if you find it is appropriate to punish the
13 defendant or to deter the defendant or others from like conduct
14 in the future.

15 Whether to award the plaintiff punitive damages and
16 the amount of those damages are matters within your discretion.

17 You may assess punitive damages against any or all
18 defendants or you may refuse to impose punitive damages. If
19 punitive damages are assessed against more than one defendant,
20 then the amounts assessed against such defendant may be the
21 same or they may be different.

22 The plaintiffs have a duty to use reasonable efforts
23 to mitigate damages by taking advantage of opportunities they
24 may have had to prevent the aggravation of their losses and to
25 reduce or eliminate those losses. To mitigate is a legal term.

06FYVERF

THE CHARGE

1 It means to avoid or to reduce something, in this case reduce
2 the amount of the loss or the damages.

3 The defendant has the burden of proving by a
4 preponderance of evidence that the plaintiff failed to use
5 reasonable efforts to mitigate her damages and the amount by
6 which the damages could have been mitigated.

7 All right. I mentioned to you that I had two
8 concluding instructions that have to do only with deliberation.
9 After you heard from counsel, I'll give you those instructions.
10 I will go over the four verdict forms with you. They are
11 basically explanatory. Then we will send you out enjoy your
12 lunch and begin your deliberations.

13 With those things said, how do we agree we will do the
14 closings?

15 If you would start, Ms. Fridegotto.

16 You may address the jury on your final argument.

17 MS. FRIDEGOTTO: Good afternoon, ladies and gentlemen.

18 I would like to start by thanking you for your time.
19 I know that it has been long, you had some long days and on
20 behalf of myself, on behalf of Mr. Kraus, on behalf of Mr.
21 Lesort and Mr. Blech, I just want to tell you that we really
22 appreciate it. We know that some of the testimony has been
23 tedious, particularly with regard to the charts, but you have
24 been troopers and we really appreciate it.

25 At the beginning of this case I told you that this was

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Fridegotto - closing

1 a case about greed, and I've changed my mind. It's a case
2 about common sense, common sense and lack of evidence. In
3 fact, an overwhelming lack of objective evidence.

4 I would like to remind you that plaintiffs are not
5 testifying -- have not testified in this case that they were
6 victims of one or two incidents of sexual harassment; 700
7 times, Ms. Ba said, Ms. Veerman claims she was asked out 100
8 times and she was touched repeatedly, constantly all the time
9 on the floor, in the halls, on the way to the bathroom, in the
10 kitchen, everywhere there was to be touched at Opia or standing
11 at the bar, everywhere, in a place which you heard been
12 described as 6,000 square feet, multiple rooms. There is a
13 lounge, there is a dining area, there is a room in the back for
14 parties, there is a kitchen, it's in a hotel. There are people
15 coming and going every single minute of every single day.
16 There are 200 people who sit at the -- can sit in the
17 restaurant on a given day and eat. Mr. Lesort testified 200,
18 you know, maybe people would be sitting, people could be
19 standing. There are parties, parties with, with, with groups
20 of people going in and out every single day. And yet not one
21 person saw a single thing. Not one person has come in here to
22 tell you I saw plaintiffs get touched. I saw them get groped.
23 I saw them -- people going up and touching their arms, touching
24 their ear.

25 Who do they have? They have each other. And we both.

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Fridegotto - closing

1 know that they have skin in the game here.

2 Does it make sense to you that someone would look for
3 a job because they want to accommodate their own schedule? Of
4 course. Absolutely. We do it every day. People have
5 engagements with their families, with their friends,
6 significant others, children, charities, church, anywhere.
7 People want to accommodate their schedules. And that is why
8 both plaintiffs testified that they came to Opiā. They came to
9 accommodate their schedules, their school schedule. They had
10 other priorities.

11 It is perfectly acceptable to have other priorities.
12 It is perfectly acceptable to aspire to be something more than
13 a waitress. It is okay to want for your school to be the
14 number one thing in your life, and it is okay for you to ask
15 your employer if they are willing to accommodate you. And in
16 this case the overwhelming evidence shows that they were. It
17 is okay for you to ask that they accommodate your schedule and
18 they give you some leeway so you can go and work your schedule
19 around what it is that you do every day.

20 It is also perfectly acceptable for your employers to
21 decide who they want to be, as Mr. Lesort testified, the first
22 people you encounter when they walk in. You want it to be
23 someone friendly. You want it to be someone who is more than
24 just a person who takes orders. You want them to be
25 personable. You want them to have experience, not a

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Fridegotto - closing

1 requirement, it's preferable, but Jimena testified we can train
2 them. However, we want you to be flexible, we want you to be
3 available, we want you to be there and you will grow with the
4 restaurant. We are a team. And when you walk in here, from
5 the minute in which you are hired -- and you heard both
6 plaintiffs testify about how they were hired, incidentally.

7 Jimena said that Ms. Ba was one of five people who she
8 interviewed in her group. In her group of people she was the
9 only person, she was the only person of color, two Hispanic
10 ladies I believe she testified to and someone else. Who did
11 she hired? She hired Ms. Ba.

12 Does this strike you as a person, does common sense
13 tell you the person who hired Ms. Ba over other people who are
14 outside her race is a racist?

15 Would it strike you that Jimena, the person who makes
16 the schedules -- you heard testimony by everyone, from both
17 sides, Jimena is the person who makes the schedule. Is the
18 person who is racist the second you walk into the door going to
19 be racist throughout your employment?

20 Is that the way that the world works? Or is the
21 person who has absolutely no interest in what race you are --
22 she looked like she was willing to learn, she was willing to
23 learn, she didn't have experience but I hired her and she put
24 her on the schedule.

25 Yes, she didn't get the best shifts, but she hadn't

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Fridegotto - closing

1 been there, she didn't know all these things that you have to
2 learn when you walk into a restaurant.

3 Did she know the food, the drinks, where the places
4 are, how to set the tables, the names of all the employees? Do
5 you know that when you walk into a place? You immediately ask,
6 are you so arrogant that you want to have the best shift
7 immediately straight off the bat, first day off?

8 It doesn't make any sense. And it doesn't make any
9 sense here.

10 Does it make sense that if you are being touched
11 relentlessly, pervasively, constantly, repeatedly, if you are
12 being made uncomfortable, if your life is being stressful, if
13 you are being emotionally distressed, does it make sense for
14 you to go out with a person who are doing this to you to
15 parties?

16 Granted New York City is one big party. Parties
17 happen every night of the week. There are bars every corner,
18 restaurants everywhere.

19 Do you go out with them outside the restaurant? Do
20 you go to their house? Do you get into their car multiple
21 times? Do you have your own party at the restaurant where you
22 are being sexually harassed? Do you have your own party where
23 you are being racially discriminated? Do you bring your own
24 loved ones, your friends, your boyfriends, your fiancée, do you
25 bring them to the place that is making your life miserable? Do

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1 you?

2 Do you hug them? Do you hug the person that is asking
3 one of your best friends to pea in their mouth? Do you?

4 Do you dance with them? Do you? Christmas of 2006,
5 two years Ms. Veerman had been there when this picture was
6 taken, two years of relentless, being asked by Mr. Lesort every
7 day, every time I was on the floor, every shift will you go
8 out, will you go out with me, will you go out with me.

9 She went out with him. She said she did. She went to
10 his house.

11 Mr. Lesort wanted to get to know her. Bring a friend..
12 He told her she could bring a friend. She went.

13 Was she scared to go up to us house? Was she scared
14 to eat with him and his cousin? Was she?

15 Common sense.

16 If something horrible is happening to you at work, do
17 you complain? Of course you do. I once heard the quote that
18 language was invented, so that humans could complain.

19 We complain every day of our lives. Now in the age of
20 technology, my goodness, the areas where we can complain are
21 almost too many. We can e-mail, we can write, we can send, you
22 know, letters of protest, blogs, things on the Internet.

23 We have the capability and it is now fortunately for
24 everyone who feels that they have been wronged in any way,
25 shape or form, whether because of their race, whether because

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1 of their sex, whether because of the color of their skin or the
2 country they are from, you have the right and it is no longer
3 any stigma associated with standing up and saying I have been
4 wronged, I've been wronged, I'm being treated improper, and
5 wrong things are happening at this place.

6 Have you been shown one e-mail? One letter? One
7 phone call? Anything, anything to substantiate that there was
8 something going on and that they were complaining about this
9 alleged racial discrimination and this alleged sexual
10 harassment? You haven't seen it. Why? Because there wasn't
11 any.

12 All these people who saw the customers in and out, the
13 managers, all the managers saw, all the waitress saw. You
14 heard them testify. People -- the restaurant business is a
15 transient industry. People don't go to a restaurant
16 necessarily and stay there for 15, 20 years. Some of them do
17 if they are lucky, but many of them go there because they want
18 to further their careers. They want to do different things.
19 They start at one restaurant, they go to another restaurant.
20 They move around. They move around.

21 Hum. Would you have looked for a job somewhere else
22 if someone was groping you, your breasts, your buttocks, your
23 arms, touching your hair, whispering in your ear every day,
24 every shift, on the floor in front of people? Would you?
25 Would you have looked for another job?

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1 Common sense.

2 A lot of people would have looked for another job.

3 Do you know who probably wouldn't have looked for
4 another job? Someone who wasn't being sexually harassed,
5 someone who wasn't being racially discriminated against,
6 someone who found in this restaurant a place where they could
7 go and they could be accommodated. Finally no longer have to
8 work the twelve our shifts from 4:00 p.m. to 4:00 a.m. in the
9 morning, I can go around my schedule. My schedule is very
10 busy, I have classes, full time, laboratories, different
11 courses that I have to take, I have an internship, so many
12 different other things that were more -- that impacted into
13 their schedules on a daily basis.

14 Common sense. Common sense says you don't like where
15 you are, you look for another place.

16 There are, you heard testimony about it, thousands of
17 restaurants in New York City, thousands. Apparently all one
18 has to do is go to Craig's list, type in server and a slew of
19 jobs appears and you can look and you can go to a call and you
20 can say this is my resume, I have worked in a restaurant
21 before, please hire me. That's how they ended up at Opia.

22 And yet they didn't do that, did they? They didn't
23 look for a job anywhere else. They liked where they were.
24 They went to Christmas parties and mingled with the staff and
25 brought their loved ones to these parties.

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1 Does common sense tell you that you wouldn't complain
2 to the man that one day you are going to share your life with?
3 That you would be -- that you would not feel the need to scream
4 to everyone this place has mistreated me; they are giving
5 better shifts to women who are outside of my color?

6 In a city like New York, ladies and gentlemen, in a
7 city like New York where, I mean, the colors of the rainbow in
8 this room. People come here from all over the world. People
9 have come here from far away, from three different continents
10 just from these two tables. They've come here to pursue their
11 dreams, their goals. That's why Mr. Lesort and Mr. Blech
12 opened their restaurant.

13 Mr. Lesort walked into a restaurant one day, started a
14 job as a busboy. He said, you know what, I like this. I want
15 this to make my live's work out of this, live's work.

16 Twenty-nine years he has been in this country, the
17 past 20-something working in this restaurant business. He
18 testified he had plenty of other businesses. He has hired many
19 different employees. These employees have followed him. They
20 have followed him.

21 Which employee, which minority employee would follow a
22 racist employer? It just doesn't make any sense. It really
23 just doesn't make any sense.

24 Not one stitch of evidence other than each other.

25 I mentioned the issue of complaints.

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1 Do you know who complained? Ms. Ba complained. She
2 complained. She complained on a blog when she saw something
3 that outraged her, when something happened to her that made her
4 furious and, therefore, she felt the need to vent, she felt the
5 need to say something, say something, do something.

6 We hear it every day when we enter the subways, if you
7 see something, say something. New Yorkers see something, they
8 say something.

9 Oh, if you go to the Internet and you look around for
10 reviews about restaurants, they will tell you everything,
11 everything under the sun about what a place is. It is good, it
12 is bad, the food is terrible, the drinks are awful, the wait
13 staff is rude. Common sense. New Yorkers complain.

14 And if they were too scared to complain, which they
15 testified that they were, that they didn't want to or that they
16 only complained, you know, just to the managers, not higher up,
17 what about all the other people in the restaurant? What about
18 the other waitresses who no longer work for defendants, who no
19 longer work at the restaurant? They don't care. They have all
20 moved on with their lives. They become actresses, yoga
21 instructors, whatever, anything under the sun. Maybe a lot of
22 them, they might run their own restaurants now. Maybe they are
23 employers themselves. They know what it feels like to work in
24 a hospitality industry.

25 Where are they? Did they come to say that they saw

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1 something? That they witnessed something? That they, too,
2 were disgusted by this horrible pervasive hostile behavior by
3 Antoine, by Mr. Blech and Mr. Lesort? No.

4 Why not? Because there wasn't any, that is why.
5 Common sense.

6 I mentioned and I've touched a bit on the issue of the
7 sexual harassment and a little bit on the issue of racism, but
8 let's think about who did testify here who isn't a party.

9 Granted, yes, Jimena does work for Mr. Lesort and Mr.
10 Blech. She works for them, had worked for them for many years,
11 twelve hour days, and yet when did she find out that Mr. Lesort
12 had a relationship with one of his waitresses? Yesterday.

13 Who told her? Me. I was the one who brought it up.
14 She has worked with the man for twelve years and yet she had no
15 clue.

16 Mr. Lesort testified, he said I'm a private person, I
17 am the persona of my restaurant. People walk in and they see
18 me, they see my, my staff, they see my employees.

19 Is that how you build careers by going around grabbing
20 people in your restaurant? No. You build careers out of
21 service, hospitality, being hospitable to your customers who
22 come back, to come back to your restaurant because they had a
23 good time, the food was good, the servers were very nice to me,
24 she gave me free ice cream, that's, you know, free cake, an
25 extra glass of wine on your birthday, and when you make a

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Fridegotto - closing

1 mistake don't worry, I'll write it off, my apologies, I am
2 sorry that your soup was cold or that you found a bug in your
3 lettuce.

4 Common sense. Common sense.

5 You also heard from Thadee. Thadee, who to hear them
6 say it, we complained to Thadee all the time every day. We
7 complained to Thadee about racism, and he told us Frederick
8 said that you are too dark.

9 What did Thadee say on the stand this morning when he
10 came here? I never said that. Frederick never said that.

11 Thadee was fired by Mr. Lesort. He told you himself.
12 If anyone has, you know, an ax to grind, it's him, Thadee, who
13 said that he worked there for years, very long hours, from five
14 to four in the morning, and he gets fired because he's tired.
15 He is the one who has an ax to grind. Yet what did he do? He
16 walked in here today and he says no, I was there, I was there
17 and no one ever said anything to me about their being racial
18 discrimination at Opia; no one said anything to me about being
19 asked out; no one said anything to me about being touched and,
20 in fact, I was shocked when I found out about this lawsuit.

21 And he took time out of his day to come here to speak
22 to you the he didn't have to do it. He doesn't work with Mr.
23 Lesort. He doesn't work with Mr. Blech. He doesn't work with
24 Jimena, either. They all fired him two years ago. And yet he
25 felt strongly enough to come in and say no, I was there, I saw

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Fridegotto - closing

1 it, this is what was going on.

2 I mentioned the issue that there weren't any witnesses
3 to what was going on. And perhaps one could say that the
4 witnesses were scared, maybe they didn't want to come here,
5 didn't want to go and testify against a former employer about
6 the wrong.

7 But that wouldn't make any sense, would it, because
8 these people, they don't work there anymore. They are not
9 there anymore. They moved on. They have gone somewhere else.
10 They have no reason to fear what Mr. Lesort might do to them,
11 or Mr. Blech. They don't have reason to fear that Jimena is
12 going to put them on a Sunday schedule for the next twelve
13 weeks and never have them work on Wednesday again. And yet
14 they're not here.

15 There has been a lot of paper shown to you, a lot of
16 paper. A lot of the charts are pretty boring to look at, but
17 they all seem to show one thing.

18 Firstly, that their schedules got better. They did.
19 They testified to it. They got on the stand and said yes, my
20 schedules got better. And the documents support that and they
21 show that. And they show that their tips got better. A
22 hundred, \$200 the first week, by the end \$1,300 in tips a week
23 for two days, three days. And remember, these tips, that's
24 only 50 percent or 55 percent. That isn't even -- they had to
25 share it with the rest of their team.

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Fridegotto - closing

1 Their shifts got better. That's why they stayed.
2 That's why they didn't look for another job. There was no
3 reason for them to look for another job. They were happy at
4 Opia, they were happy. They made friends. They met their
5 boyfriend and fiancée, they brought their friends to this
6 place, ladies and gentlemen. They brought their significant
7 others and they danced with people and they met the spouses of
8 their managers and everyone else and they mingled and they
9 bought each other gifts.

10 You heard testimony regarding the racial makeup of
11 Opia. Everyone under the sun; men, women from all different
12 races, all different colors, all different origins. They have
13 come here from afar.

14 Jimena from Uruguay. Mr. Lesort and Mr. Blech from
15 France. They mentioned the sue chef was from West Africa.
16 Ms. Ba is from West Africa as well. Ms. Veerman Brazil.

17 You were willing to walk into the restaurant and work,
18 you had a job. You were willing to work, you are willing to do
19 what was necessary in order to get at the end of the day count
20 your tips, go home, put up your feet and say tomorrow I'm going
21 to have to do this again, but you know what, that is why I
22 work. I work to pay my bills, I work to pay for school, I work
23 to make something out of myself. And that is what they did.

24 Ms. Veerman didn't want to be a waitress. She's a
25 nurse, a registered nurse, possibly one of the hardest jobs in

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1 the world, definitely one of the least -- the most
2 underappreciated. They do all the work and the doctors get out
3 glory.

4 She got her dream. She wasn't emotionally distressed
5 at Opia. She wasn't ruined by Opia. She wasn't damaged by
6 Opia. She got what she wanted. She got a job. She got
7 schedules, she got good tips. And everything all works
8 together and now she is where she is and she doesn't -- she
9 makes much more than she ever made at Opia. Opia was a
10 stepping stone for her.

11 Ms. Ba has graduated. She has a degree in finance.
12 She, too, is going somewhere.

13 (Continued on the next page)

14
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25

1 MS. FRIDEGOTTO: She has -- they just graduated, in
2 fact, I believe that she testified to. She is also well on her
3 way into her career. Opia was a stepping stone. But it wasn't
4 this stepping stone that they would like you to believe that it
5 was. It wasn't this den of iniquity where people were touching
6 them and groping them and feeling them up every minute of every
7 day. No. It really was not. And how do we know this? Common
8 sense. They stayed. They stayed there for a long time. And
9 they didn't look for a job anywhere else.

10 Not only that, but when they didn't work there
11 anymore, Ms. Ba wanted to go back, back to this place. She
12 testified that she met with, who? This sexual predator, this
13 sexual predator, Mr. Blech, she met with him to ask for her job
14 back.

15 Now, tell me, ladies and gentlemen, maybe I'm just not
16 understanding, but does common sense tell you that once you are
17 free from a place that has been harassing you for years or
18 where you have been discriminated against on the basis of your
19 race and your color, do you want to go back there? When
20 there's 18,000 restaurants in New York City where you could be
21 a waitress? Does that make sense to you?

22 When I did my opening on Friday, I told you that the
23 evidence would show that they weren't fired. I told you Ms. Ba
24 had walked out on her job, walked out when she was shown an
25 error that she had made, and just walked out, in the middle of

06EAYEE5ps

Summation - Ms. Fridegotto

1 service, in the middle of service. What does that do to your
2 team? The team that -- you hear Mr. Lesort -- survives on the
3 basis of everything that you do. She obviously didn't care.
4 Jimena, in this memo that was prepared, yes, it was prepared
5 immediately after they received a letter from the attorneys.
6 She memorialized everything that she knew immediately on a
7 piece of paper, wrote it down. That memo that plaintiff's
8 attorney will have you looking at the word "responsibility" and
9 trying to figure out if that is a cutesy way of saying that we
10 break the law here at Opia, that memo, made two weeks after
11 they received a letter from an attorney, says Ms. Ba walked out
12 of her shift in the middle of service. In the middle of
13 service. She realized that she made a mistake. Two mistakes.
14 First mistake wasn't -- could have been an honest mistake, the
15 one with the credit card. But you heard testimony, they never
16 asked her to pay the bill. They didn't even owe the money at
17 the time. They didn't owe the money at the time. Why would
18 they have asked her to pay the bill? It just doesn't make any
19 sense.

20 And yet she wanted to come back. And who did they
21 want to come back through? The man who wanted to pee in her
22 mouth. The man who groped her 700 times on the floor at Opia,
23 the same floor that she walked out on in the middle of service,
24 with all those 200 people having their dinner, having their
25 drinks, all 50 employees of Opia walking around, the bussers,

06EAYEE5ps

Summation - Ms. Fridegotto

1 the runners, the servers, the cocktail waitresses, the
2 cleaners, the people in the kitchen, the people who cooked the
3 food, the sous chefs, the manager, two managing members -- all
4 these people, to see what was going on, all the time, from
5 morning, when they opened, to evening, when they closed.

6 But she didn't get her job back. And so then here we
7 are. Her friend is still at Opia. And she had a moment of
8 arrogance too. It was Sunday schedules. "Oh, I didn't know I
9 was on the schedule." We've all heard testimony, the schedules
10 were posted on the wall for everyone to see. It was the
11 responsibility of every single waitress and server and waiter
12 and every person who had a shift to look and see what day they
13 were on the schedule for. "I didn't know." OK. Honest
14 mistake. But then do you mouth off to your manager about it?
15 Or do you say, I'm sorry, I apologize, my mistake, it won't
16 happen again. No. So instead she got suspended. Suspended
17 for what? For not showing up for her shift and for being rude
18 to someone who had a higher title than her. Perfectly
19 acceptable. It makes sense. You mouth off to someone who is
20 higher up than you and something is going to happen.

21 Now, a lot has been made about whether it's one week,
22 two weeks. It doesn't matter. Two weeks later, they had a
23 lawyer. Two weeks later she never called in to indicate that
24 she wanted to go back. In fact, Mr. Blech testified that she
25 said, you know what, I think I need a break from Opia. A week

1 later, there's the letter from the lawyer: I think I need a
2 break. The message which we read -- which we heard being read
3 out, "I heard that you had a problem with management. I hope
4 you come back in a week." That's what the message said. Does
5 that sound like the message that someone who fired someone
6 would leave on someone's voice mail message?

7 Now I ask you to use common sense one more time.
8 Things happen to us in life. Good things, bad things. And
9 there are certain systems in place to protect us, to protect us
10 from when we are suffering wrongs. There are courts, just like
11 this one. And there are other agencies as well, agencies that
12 protect people when they lose their job. But neither plaintiff
13 filed for unemployment. And yet they needed money. Well, tell
14 me, ladies and gentlemen of the jury, isn't unemployment there
15 to protect you from -- protecting you from moments in which you
16 don't have a job? Protecting you in situations in which I'm
17 looking, I'm looking everywhere, I've looked on the Internet,
18 I've gone to this place, I've gone to that place, and they're
19 not hiring, they only want the night shift, they only want me
20 to go to work when I'm at school. It is there to protect you.
21 When isn't it there to protect you? When you walked out. When
22 you have walked out of your job. When you've quit.

23 You've heard the testimony. I don't need to repeat
24 it. They never suffered any adverse employment action at Opia.
25 They never suffered any sexual harassment either. And they

1 didn't suffer any racial discrimination.

2 The evidence that we've heard in the past couple of
3 days, I believe, confirms that. And common sense will tell you
4 that when you are deliberating the evidence that you have heard
5 this far.

6 You are the trier of fact. You get to take everything
7 that you have heard in the past couple of days and talk about
8 it amongst yourselves, use all eight of your experiences to
9 piece it all together, and then use your joint common sense to
10 figure out, does plaintiff's version make sense? Does it make
11 sense that they went to Opia? Yes. Does it make sense that
12 their shifts improved at Opia? Yes. Does it make sense that
13 they stayed at Opia? Not to hear them speak about it. But if
14 you listen to everyone else, it does make sense. Their shifts
15 got better. Money was good. Schedule was being accommodated.
16 Does it make sense that they behaved the way they did? That
17 they didn't complain, that they didn't scream to the top of
18 their lungs about all the horrible things that were happening
19 to them at every shift, by people who were supposed to be
20 protecting them, their employers? Does it make sense?

21 Thank you very much for your time.

22 THE COURT: All right, Ms. Fridegotto. Thank you.

23 MR. GOLDBERG: Thank you, your Honor.

24 THE COURT: Mr. Goldberg, you may sum up.

25 MR. GOLDBERG: Thank you very much.

1 I'd like to start out by agreeing with Ms. Fridegotto
2 on one point. That is, to say thank you, thank you, Mr. Jones,
3 Mr. Docherty, Ms. Mapp, Ms. Reed, Mr. Miller, Mr. Rowe,
4 Mr. Loperena, and Mr. Cohen. Thank you for your time. Jury
5 service is time consuming. Putting on a trial is time
6 consuming. And I can tell you that this trial has moved along
7 very quickly, very smoothly. And I appreciate the Judge on
8 that, because we really moved through witnesses and attorneys
9 fast. So thank you to all of you because you're not doing this
10 as your living and you're giving us your time. And I do
11 appreciate that.

12 Listening to Ms. Fridegotto's summation brought back
13 some memories for me. I remember after I graduated from
14 college I went to work for a large company. And I had a boss
15 that was really rough on me, very demanding, sometimes a little
16 bit abusive, made me work late at night, very rough on me.

17 This same boss would sometimes say to me, let's go for
18 lunch, let's go grab a beer after work, my car, then I'll bring
19 you back and drop you off. And I worked for a very large
20 factory. Big company.

21 Did I turn the boss down when the boss said, let's go
22 grab a bite to eat? The same boss that made me work late the
23 night before, that made me redo work, teaching a young college
24 graduate what it's like to work in a large factory. And I was
25 a supervisor. It was rough. But I did go to lunch. I took

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Summation - Mr. Goldberg

1 that car ride from the boss. I didn't quit. And I didn't look
2 for another job. I had a reason. I was right out of college.
3 I was trying to build a résumé. I wanted to have some
4 longevity on it and hopefully go to law school. So I made a
5 choice. I did what I had to do.

6 At the same time, when opportunity presented itself, I
7 tried to let my boss know, you know, you don't have to -- you
8 don't really have to raise your voice to me, I understand what
9 you want me to do. I tried to get the boss to change his
10 behavior a bit. I tried. I did the best I could.

11 When the time was right and my career goals were being
12 met, then I left on my own terms. I wasn't becoming a nurse.
13 I wasn't going through Ms. Kadia's pursuit into finance. I was
14 navigating my own career. And so it seems odd to me that
15 somebody would say to me, if somebody said to me, you should
16 have quit, a lot of companies you could go work for, you went
17 to a good college, what's wrong with you. When you are the
18 victim of harassment, it's not your verdict to quit that job
19 and go find some other job. That's not what the law requires
20 or society requires. You are entitled to say, I'm going to try
21 to tough it out and try to get that person to change their
22 behavior, even if there's no HR department, which Opia doesn't
23 have. There's no human resources department.

24 By the way, I'm not even sure it would matter if there
25 was, because who's in charge? The two gentlemen that are

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1 accused of sexual harassment. So even if there was an HR
2 department, the HR director would answer to Mr. Blech and
3 Mr. Lesort. Yeah, there's a handbook. Took a look at it. But
4 they said they don't follow their own policies. In fact,
5 Ms. Fridegotto put the handbook out there, to I think
6 Ms. Jimena or Mr. Blech or Mr. Lesort, said, there's your tip
7 policy, there's your policy on charging back employees. Do you
8 follow it. They said, no, it's just in there just for threat.
9 So they have the handbook. They tell you they don't follow it.
10 They have no human resources department. And the people
11 accused in this case of the wrongdoing, they're the owners. So
12 there's nobody above them to go to.

13 Now, are people perfect? We're not perfect. I'm not
14 perfect. I made a mistake on the damages chart. And I'm not
15 happy about it. And my client told you on the witness stand,
16 so now forever and ever it's on the record: Ken Goldberg made
17 a mistake on a damages chart. It happened. We all make
18 mistakes. But it's one thing to say, ask somebody out once and
19 then realize, you know what, they don't want to go out with me,
20 and you don't ask them again. We wouldn't be here if that were
21 the case. It's another thing when you ask somebody out
22 numerous times, a hundred times, and they say no and you keep
23 asking.

24 Now, Ms. Fridegotto says to you, well, Ms. Ba says she
25 was touched 700 times and you can't believe that. On the other

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Summation - Mr. Goldberg

1 side of the equation, you have Mr. Blech testifying, I asked
2 her out a couple of times. So Ms. Ba refers it as 700. Maybe
3 it felt like 700 and it was only 500. She's telling you, in
4 the months she worked there, the hands were on her all time.
5 And when asked a year, two years later in a deposition to
6 quantify it, she gave her best estimate, because, to her, it
7 was 700 times. It was every time she saw him on the floor.
8 And in a busy restaurant that has 200 people coming in, people
9 who don't care less about who's working there, they're just
10 there to have a good time, maybe they're there because it's
11 after work and they're having a beer with their buddies, maybe
12 they're there to watch a game on the big screen. Maybe they're
13 there because they're looking to meet somebody special. That
14 happens. They might not care at all if a waitress is being
15 harassed by an owner. That might be something that they don't
16 even pay attention to. And if they don't know the people,
17 maybe they don't care.

18 Ms. Fridegotto said to you, well, the plaintiffs
19 didn't parade in all these employees to say I saw it, I saw it.
20 You heard the judge give an instruction. And it's not how many
21 witnesses you parade into a trial. That's not who wins. It's
22 the quality of what the witnesses say. Ms. Fridegotto
23 mentioned, well, we brought this guy in name Thadee, the famous
24 Thadee. He didn't have to be here. I wrote down what she
25 said, something about, he didn't have to be here. She didn't

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Summation - Mr. Goldberg

1 mention a subpoena, trial subpoena. That brings somebody in.
2 So to say that somebody came in here voluntarily out of nowhere
3 to tell truth because they feel motivated and then not mention
4 a trial subpoena, well, a trial subpoena says you show up or
5 they go to the judge, and if you don't show up, somebody comes
6 knocking at the door. That's a trial subpoena.

7 And the fact that it's a transient business, yeah,
8 there are a lot of young people that go through Opia. They
9 change addresses. They move out of town. They change careers.
10 So if the plaintiffs don't parade in some of these folks, don't
11 assume that's because those folks don't have something to say.
12 There could be a host of reasons: can't locate them, they have
13 moved, they have other careers. Maybe they are on a modeling
14 shoot, because a lot of the folks at Opia, a lot of the
15 cocktail waitress, they go into modeling, they go into acting,
16 they go into singing, they go Off Broadway. Maybe they got a
17 gig. There's a whole bunch of reasons why people may or may
18 not show up. They may be in the industry working somewhere
19 else. They may be looking to get into one of these new
20 resort -- other restaurants.. They may not want to challenge
21 someone who is very powerful and make enemies just to help
22 somebody they've worked with. Not everybody is going to show
23 up and be available and come to court, and you shouldn't read
24 into that. It's what you hear in the court. It's not the fact
25 that there's some person that didn't come in and testify.

1 I want to agree with Ms. Fridegotto on one other
2 point. And then I'm going to go into a lot of disagreement,
3 and try to go as quickly as I can.

4 Ms. Fridegotto changed her position a bit. She said,
5 I told you last week this case was about greed, it's no longer
6 about greed, it's about common sense. I agree. It never was
7 about greed. You saw the damages charts. You know these
8 ladies have moved on with their lives. They have other careers
9 they are pursuing. They did not hire me, take all this time
10 and spend all this period of time from '07 to 2010 out of
11 greed. They did it because there's something called right is
12 right and wrong is wrong. And if you feel in your heart that
13 there's something wrong and you're in a position to do
14 something about it and you're no longer threatened by the
15 people who made your life miserable and took advantage of you,
16 and you feel like there's a way to say, you know what, I'm away
17 from them, I'm going to make my statement, I'm going to make
18 sure this doesn't happen to somebody else, then it's OK. It's
19 not a crime to file a lawsuit if you feel you've been wronged.
20 And this case wasn't about greed, as Ms. Fridegotto said. It
21 wasn't.

22 Now, Ms. Fridegotto waved some photos at you, so I
23 want to wave them as well. The fact that you have a picture of
24 Ms. Veerman, a foot or two foot way, in the middle of a
25 Christmas party with a roomful of people and Mr. Blech dances

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Summation - Mr. Goldberg

1 two feet away from her, you know, that doesn't mean that
2 Ms. Veerman thinks that Mr. Blech is a Boy Scout. That's a
3 Christmas party. That's the same thing as my boss saying to me
4 20 years ago, a guy who was giving me a really hard time, you
5 know, let's grab a beer here, let's grab a beer here at a
6 Christmas party. And you go and you have that quick beer. The
7 fact that Ms. Veerman had her arm in front of Mr. Blech, that's
8 a posed photo. That's a roomful of people. And the person
9 with the camera says, hey, let's take a picture. If we asked
10 you jurors, get a little closer, we want to make a picture,
11 somebody might go like this. And it wouldn't mean that you had
12 affection for someone. That means you're going to put your arm
13 around them. And it might take all of two seconds.

14 You'll notice, who's far away from Mr. Blech? Ms. Ba.
15 Ms. Ba is keeping her distance from Mr. Blech. She's the one
16 that he had affection for.

17 Mr. Blech gave you an answer that I wrote down and
18 circled, "I'm a man." That was his answer, when we asked him
19 about his alleged affair with Ms. Ba, which she said is
20 fabricated, fabricated because he knows people saw him touching
21 her and making advances. He knows. So instead of saying, I
22 did nothing, when he knows people saw, he says, well, it went
23 even further, it went to the extreme. And my "defense" for
24 this: I'm a man.

25 Mr. Lesort's defense is, Opia is my social life.

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Summation - Mr. Goldberg

1 That's where Mr. Lesort gets his girlfriends. And he's had a
2 few. And he wanted Ms. Veerman badly, so badly he kept asking
3 her out. And he had the power over her, just like Mr. Blech
4 had the power over Ms. Ba.

5 Mr. Lesort has had girlfriends, and that's his social
6 life. And he's in a perfect position to get it, right. He
7 owns the business. Young guy. Presents himself well. And he
8 hires all these young women, that have no money in their
9 pocket, move into New York just trying to make their rent,
10 maybe they work in a second job. They got no power. But Opia
11 is a chance to make money, and look at the guy in charge. He's
12 got it made. Except when he made advances to Ms. Veerman.
13 Ms. Veerman had a boyfriend, was going to nursing school, and
14 wasn't interested.

15 In fact, Ms. Veerman, yeah, she brought her boyfriend,
16 this gentleman. Looks like a nice guy, right? He went to Opia
17 with her once for a Christmas party. Does that mean that
18 Ms. Veerman didn't have problems at Opia with Mr. Lesort? Is
19 her arm around Mr. Lesort in any picture? Is there a picture
20 of Ms. Veerman with Mr. Lesort in some kind of intimate
21 position that suggests that that was OK with her? The answer
22 is no. You'd have it, by golly, if it existed, right? Because
23 they've been flashing photos at you this whole time. One was
24 sitting here for hours. If there was a picture of Ms. Ba
25 sitting in Mr. Blech's lap at a Christmas party, don't you

1 think you would have seen it? It doesn't exist. Because
2 that's where the lines were drawn. They told you,
3 Ms. Fridegotto said to you that Jimena came in, Ms. Pereyra,
4 and that you should take her testimony because she's been at
5 this establishment for many years, she makes the schedules, she
6 does the hiring. Ms. Jimena Pereyra has been employed by
7 Mr. Lesort and Mr. Blech forever, as far as I'm concerned.
8 She's their ally. She told you that. She's been on the
9 defense team from the beginning of this case.

10 So right after my clients lost their jobs and had a
11 lawyer make contact to raise the claims, she wrote a protected
12 memo. That memo, from June of '07, is not a contemporaneous
13 memo that says, today, this happened. Jimena couldn't write
14 the memo because when Ms. Veerman got fired, Jimena was not
15 there. and when Ms. Ba was fired -- and Jimena's the one who
16 fired her -- Jimena didn't write a contemporaneous memo. She
17 waited, several months later, till my firm wrote a letter, and
18 wrote a cover-your-you-know-what memo. I'm not going to use
19 that, any more vulgar terms with you. You've heard enough
20 graphic terms. But Jimena wrote a cover-your-you-know-what
21 memo in June of '07, and that memo said Ms. Veerman was
22 suspended for two weeks and never came back. Well, I have the
23 work schedule. It's in this big pile of exhibits, that I
24 invite you to look at, the schedule that should have had
25 Ms. Veerman's name on it if she had been suspended for two

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Summation - Mr. Goldberg

1 weeks, because Opia makes these schedules at least a week in
2 advance. That's what they said. And they gave them to me. So
3 don't you think if they had really suspended Ms. Veerman for
4 two weeks, beginning on May 14, a Monday, the schedule in there
5 from May 28 would have Ms. Veerman's name? Then they could
6 say, look, here's the schedule, we stuck it back on, consistent
7 with the two-week suspension, and she blew off work. That
8 schedule doesn't have her name on it. That's because they
9 didn't suspend her.

10 When I started to bring this out in this litigation,
11 then a new document popped up. This was an affidavit. I
12 didn't put it into evidence. But I asked Ms. Pereyra, I said,
13 two years later you change your story. Now it's only a
14 one-week suspension. Isn't that convenient, because you didn't
15 produce a work schedule for the week after Ms. Veerman was
16 fired, right? You didn't produce a schedule. So now there's a
17 mysterious document that, if Ms. Veerman had a one-week
18 suspension, they would produce it with her name on it. Doesn't
19 exist.

20 So you change your story sometimes. Not me. But they
21 change their story. And Ms. Pereyra was confronted with that
22 on the witness stand. And she did what she thought she should
23 do -- protect her employer for ten years or more, protect
24 herself because she's caught in a lie, and pretend that her big
25 memo that says "Our policy is to make the employees pay the

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Summation - Mr. Goldberg

1 unpaid customer bills" is somehow not what the English says.
2 It somehow doesn't mean what it says. Even when Mr. Blech and
3 Mr. Lesort admit that they do ask employees to pay from time to
4 time, they admit that, they said it's to threaten them, they
5 call it a threat, we threaten them. So you tell Ms. Ba, if you
6 don't pay the bill, you got no job. Ms. Ba says, I'm not
7 giving you \$569. It's not my fault and you don't have a right
8 to ask. Ms. Ba says, well, I have no job, so I'm leaving. She
9 wasn't quitting. She was fired, exactly what they said they'd
10 do. It's in the handbook, which they now tell you they don't
11 follow. They have no HR department. It's in Ms. Jimena's
12 memo, Exhibit 18. And it's in the testimony of Mr. Blech and
13 Mr. Lesort.

14 So when you use common sense, which is what
15 Ms. Fridegotto said, yeah, OK, let's use some common sense.

16 I have some other points to cover with you. They
17 talked about the issue of schedules. I gave you a name of a
18 waitress that's white, Jelena Baranov. I have nothing against
19 the lady. So let's put that out there. She's hired at the
20 same time as Ms. Ba. Ms. Ba gets bad shifts. Jelena gets
21 great shifts. Jelena makes tons more money than Ms. Ba. Not
22 only that, but Ms. Veerman, who has been there eight months
23 longer than Ms. Baranov, is getting the same bad shift as
24 Ms. Ba. So Opia is hiring these cocktail waitresses, they're
25 white, and they are getting the Wednesday and Thursday shifts.

1 And they are making a lot of money. And that's showing you
2 discrimination in shifts.

3 And we gave you examples. Exhibit 17, you'll see the
4 ticket reports. We don't have schedules from 2005 because
5 somehow Opia doesn't have them anymore. If they had them, they
6 would show you exactly what I'm telling you. And for the first
7 half of '06, they gave us partial ones. Why? Where are all
8 the ones from the first half of '06? Mysteriously we just
9 don't have them. The plaintiffs have a hard time in these
10 cases because it's not my client, the corporate entity, who I
11 can go and rummage through their documents. We have to depend
12 on what they give us. We have a hard time because there are
13 witnesses that may work for a company but they may not want to
14 tell the story in court, because they work for the company.

15 Plaintiffs, they have a tricky time. Now, when
16 Ms. Fridegotto says, we didn't bring in the witnesses to
17 corroborate the story, let's turn it around, the two guys, two
18 managers, that dealt with Ms. Veerman when she was fired, two
19 managers, one is Sean Zier. That's the guy who, on the Sunday,
20 called Ms. Veerman and said, you're on the work shift, where
21 are you. Where is Mr. Zier? The defendants didn't bring him
22 in to say, she was on the schedule, she didn't show up, I
23 called her, and then -- and I didn't let her come to work that
24 day. Where is Mr. Zier? OK. He's nowhere. He's not my
25 witness. He's nowhere. I ask you, where is the work schedule

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Summation - Mr. Goldberg

1 that shows May 13? It's not even in the pile of exhibits, the
2 work schedules for '07. That's not there. I don't even have
3 the Sunday, May 13, in there that says Ms. Veerman is supposed
4 to work.

5 Ms. Veerman, who is a very believable person, said
6 basically, I took Mr. Zier at face value. I got a phone call.
7 I'm enjoying Mother's Day. He said I'm on the schedule. I
8 don't know that. I hadn't seen that date. It wasn't my
9 regular shift. I ran to work.

10 There's no schedule in there from Opia that even
11 proves Ms. Veerman was on the schedule. But even if you take
12 that at face value that she was, she did the right thing. And
13 Mr. Zier isn't here to tell you how insubordinate and arrogant
14 Ms. Veerman was.

15 The other guy, Mr. Kirill Kisselev -- and I'm sorry
16 with all the names. Some of them are hard to spell. But
17 Mr. Kisselev is the guy who, on that Monday, told Ms. Veerman,
18 you're fired, Mr. Lesort doesn't want to deal with you. Where
19 is Mr. Kisselev to say, no, no, no, I didn't fire you,
20 Ms. Veerman, I gave you a two-week suspension, or maybe one
21 week now they changed their story. Where is Mr. Kisselev? So
22 if you want to make an issue of witnesses not showing up, then
23 I would say, where are their witnesses for Ms. Veerman?
24 They're not here.

25 The only issues that came up that I wanted to quickly

1 comment on was the unemployment insurance benefits.
2 Unemployment insurance benefits are, as most people know,
3 they're not a fortune in money. And they're not intended to
4 protect you from sexual harassment. It's like a stopgap. And
5 if my clients, Ms. Veerman and Ms. Ba, didn't apply because
6 they didn't know about it or because they were just busy
7 looking for work and didn't want to get a handout, I don't
8 think you fault them for that, that they were trying to get a
9 job. I think it's OK.

10 You know from the basic evidence that I want to go
11 over and try to go as quickly as I can, Ms. Veerman was
12 testifying about an hour when I got up there, and I think she
13 was up there for two hours and when Ms. Fridegotto questioned
14 her. And it went on and on. But what you heard from
15 Ms. Veerman, what was very, very sensible and common sense,
16 was, she went to Opia so she could work a schedule that made
17 sense for her and support herself through nursing school. She
18 didn't go there looking for trouble. She didn't go there to be
19 sexually harassed.

20 The evidence is undisputed, she was a good cocktail
21 waitress. You heard that from Mr. Lesort, Mr. Blech,
22 Ms. Pereyra, and even Mr. Thadee, who showed up out of the
23 blue. Everybody said Ms. Veerman was a good cocktail waitress.

24 Ms. Veerman said that Mr. Lesort asked her out, she
25 said it was at least a hundred times. Mr. Lesort, in

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Summation - Mr. Goldberg

1 deposition testimony: One to five. Although his testimony
2 changed a bit when he was here on the witness stand. But you
3 saw me parading up and down to the witness stand to show them
4 their transcripts. So Mr. Lesort admits he asked Ms. Veerman
5 out one to five. I suggest to you, his number is way too low.
6 That's just a little convenient for him. Ms. Veerman says, I
7 was asked out numerous occasions and I turned Mr. Lesort down.
8 She explained to you how Mr. Lesort did touch her. He might
9 have been more discreet than Mr. Blech's touching of Ms. Ba,
10 but Mr. Lesort did touch Ms. Veerman. He put his hands on her.
11 And Ms. Veerman did go to his apartment once for dinner, under
12 the premise that there was going to be a party of people
13 watching the Oscars or some other show, and she went there
14 because he had not taken no for an answer and she wanted him to
15 see, if you see me in another place, another context, you
16 understand, I'm not interested in you. She tried to bring her
17 friend, who canceled at the last minute. He's her boss. He
18 owns the restaurant. And she hasn't been able to get him to
19 accept no for an answer. So she did go to the apartment and
20 had a meal. And he did touch her breast. He made a move on
21 her. And she made it clear to him, what are you doing, don't
22 put your hands on me, don't you get it by now, I'm not
23 interested in you. You know I have a boyfriend. I brought him
24 to Opia. Don't you get it? I'm not interested.

25 And Mr. Lesort, who told you that Opia is his social

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Summation - Mr. Goldberg

1 life, he didn't give up. He just, he kept going. And he asked
2 Ms. Veerman out, in April of '07, to a restaurant opening. And
3 Ms. Veerman, as she explained, became more forceful this time
4 in rejecting him. She hadn't been able to get him to stop by
5 simply saying, I'm busy, I have school, I have this, I have
6 that. She hadn't gotten him to stop by saying, I don't want to
7 date my boss. She tried all these tactics. And in April of
8 '07, she was very, very forceful with him. They pushed the
9 envelope. She said, "You've been asking me for a year and a
10 half. Don't you know I don't want to go out with you? I have
11 a boyfriend." She was very forceful.

12 And Mr. Lesort had had enough of her. He didn't want
13 to deal with her. And that's the message that Kirill Kisselev
14 gave Ms. Veerman when she was required on May 14. "Mr. Lesort
15 doesn't want to have to deal with you anymore." That's exactly
16 the message that was passed on. And the meaning was, whether
17 Mr. Kisselev knew it or not, the meaning to Ms. Veerman was,
18 you don't want to have to deal with me because I'm coming to
19 work at your restaurant and I don't want to go out with you,
20 and you want to date the women who work at this restaurant, so
21 you'll find somebody else. You dated other women, you put your
22 hands on them in front of me. It's what you do.

23 A little bit about Ms. Ba. I had Ms. Ba on the
24 witness stand probably an hour, hour and a half. And then
25 Ms. Ba was questioned on cross, and then today she acknowledged

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Summation - Mr. Goldberg

1 the damages, the mistake on the damages chart. Ms. Ba went to
2 Opia for her own reasons. She was going to college,
3 St. John's. And this is how she supported herself through
4 college. She didn't go to Opia looking for trouble. She's not
5 bringing this lawsuit out of greed. Mr. Blech was infatuated
6 with his Ba. He was infatuated with her, and kept touching
7 her. He would come up from behind and put his hands on her.
8 He touched her at his wife's birthday party and told her that
9 he liked her buttocks better than his wife's, and he said in
10 French "un deux, un deux," to watch her buttocks go up and
11 down.

12 Mr. Blech was infatuated with Ms. Ba. And Mr. Blech's
13 conduct was not as discreet as, perhaps, Mr. Lesort's conduct
14 was. So in this lawsuit when confronted with the questions,
15 Mr. Blech came up with a story, which is, not only did I give
16 her a ride home once, but we had oral sex. And I asked
17 Mr. Blech, "Did you have any foreplay, you know, tell her
18 You're beautiful, I want to go out with you?" He made it sound
19 like, no, there was no foreplay, there was no sexy talk,
20 there's just this car ride which all of a sudden turns into
21 oral sex. I asked him, "Did you want to go out with her
22 afterwards? You had this great experience." "Well, no, I
23 decided not. I decided, no, that's not for me. I feel bad
24 about it." But he didn't feel bad about it really until my
25 firm's demand letter came in and he couldn't hide it anymore,

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1 and then he had to start making up stories to his wife.
2 Otherwise he would have kept this alleged affair a secret.

3 There was no affair. What happened was, Mr. Blech was
4 infatuated with Ms. Ba, waited outside the restaurant for her,
5 and early on in the employment said, I'm driving up to my home
6 in Westchester, I'll give you a ride. She took a ride first
7 time, no problem. He kept his hands on the steering wheel,
8 which I think Ms. Ba probably expected he would do. The second
9 time he offered her a ride, she took the ride. Maybe it was a
10 judgment error. But he put his hands on her. She didn't
11 reciprocate, at all. There's no evidence that she
12 reciprocated. There's no, like, receipts to show, I took her
13 out to dinner, we were here, we were there. There's no
14 photographs. There's a story that Mr. Blech made up so that he
15 could turn the tables in this lawsuit and make it sound like,
16 I'm going to blame the victim and say, somehow I had a thing
17 with you. And I don't think, in listening to the testimony of
18 Mr. Blech -- Mr. Blech, I asked him a lot of questions about
19 his story, his version of events. And you saw. I had to show
20 him his transcript a lot because a lot of his answers had
21 changed.

22 Ms. Ba did nothing wrong. She didn't quit Opia. She
23 was confronted with an unpaid customer bill in accordance with
24 Opia's written policies and practices. She was told, you have
25 to pay it or you have no job. She didn't pay it. She had no

1 job.

2 She was also let go not just because of that, which is
3 the Labor Law 215 claims, but she lost her job because
4 Mr. Blech similarly ran out of patience with her. She didn't
5 want to be with him, so this was a way to get rid of her, a way
6 to get rid of Ms. Ba, bring up an issue, create an incident,
7 when there was no incident. Why would a waitress quit if the
8 boss didn't ask her to pay the bill but simply said a customer
9 is disputing that? Why would a waitress take that to mean
10 something that makes them quit and have no job and be
11 unemployed? Common sense tells me there's no reason Ms. Ba
12 would quit if she was simply told a customer is disputing a
13 bill that's two months old. Ms. Ba didn't quit. She just
14 didn't pay a bill and she was told you have no job.

15 And in the case of Ms. Veerman, Ms. Veerman didn't
16 quit. There was no suspension. It's contradicted by all the
17 documents and records. Ms. Veerman was fired because
18 Mr. Lesort did not want to deal with her anymore. That's
19 exactly what was said to Ms. Veerman.

20 So Ms. Ba, she lost her job because she turned down
21 Mr. Blech and she didn't pay an unpaid customer bill.

22 Ms. Veerman lost her job because she had turned down
23 Mr. Lesort, only one month earlier in a very forceful way. In
24 addition, as you've heard Ms. Veerman and Ms. Ba testify, they
25 take the position that they didn't get their fair share of

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Summation - Mr. Goldberg

1 equal shifts and that when they spoke to a manager, Thadee,
2 they were told they were considered "too dark" for the good
3 shifts. And they were viewed as "too dark." And if there were
4 enough white cocktail waitresses like Jelena Baranov and
5 others, then the good shifts would go to them. But when the
6 restaurant was understaffed and when the World Cup was going
7 on, then there's more of a need and then my clients got some
8 better shifts, which was not in dispute. But my clients claim
9 that they were discriminated against based on their race and
10 their national origin. They weren't treated the same. They
11 were treated as second-class citizens. And that Mr. Lesort had
12 nicknamed Ms. Ba "the African."

13 Finally, on the issue of the tips, it's undisputed
14 that Opia takes 5 percent from the waitresses and gives it to
15 managers. Opia's defense is, they're not managers, they're
16 *maître d's*, which is OK. But every piece of paper that we've
17 gone through does not identify any of these managers as *maître*
18 *d's*. It doesn't identify them that way. And if they were
19 *maître d's*, I would think it would be in the handbook or in the
20 payroll report. And the tips aren't even mentioned in the
21 payroll report.

22 So if a *maître d's* is getting tips, it ought to be in
23 the payroll report. If the managers are stealing tips that
24 they're not allowed to have, then I would not expect it to be
25 in the report, and it's not there, because it wouldn't be on

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Summation - Mr. Goldberg

1 the W-2. It wouldn't be reported. It's illegal tip money
2 being funneled off to managers, who are not entitled to it. So
3 there's no way you're going to report it to your accountant and
4 put it in a W-2. They're not allowed to have the money. So
5 it's not on there because they can't have it. That's why it's
6 not on there. that's common sense as defined by Ms. Fridegotto,
7 when she said this case is about common sense.

8 Now, about the issue of damages. The Judge will, you
9 will be getting some verdict forms so that you can work your
10 way through the claims and the requests for damages. The
11 damages charts were shown to you before, and they will be in
12 some documents that you will be able to look at. But my
13 clients, they lost their job, they were fired. They didn't
14 have jobs waiting for them. And they made less money in the
15 jobs that they did find afterward. And they looked for work.
16 So they have lost earnings damages. It's in a spreadsheet.
17 There was a mistake in the math. It's fixed. So the math is
18 there for you to see. It's not about greed. But there is some
19 money that was lost, in lost earnings. My clients did suffer
20 emotional distress damages. A woman who goes through that kind
21 of sexual harassment and race discrimination and touching and
22 gets treated in such a degrading manner, of course there's
23 going to be emotional distress. There's no medical bills.
24 They didn't go to doctors. It's conceded. That doesn't mean
25 they didn't suffer emotional distress. And if a person thinks

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1 about what happened to them and the type of comment and the
2 repeated comments and the sexual overtures, it's reasonable
3 that they would have emotional distress. And there should be
4 some compensation for it. And that's left to the jury.

5 And on the issue of punitive damages, which is in this
6 case, punitive damages are there to send a message to the
7 owners of this business, you can't do this. You can't take
8 young women, who are depending upon this place for money to pay
9 their rent, and take advantage of them. It has to stop. And
10 you have to send -- and that's how you send a message, with an
11 award of punitive damages. The amount, if you award it, is
12 left to your discretion. Of course a plaintiff's lawyer wants
13 a larger award than a smaller award. It's obvious. But it's
14 left to your discretion to figure out what amount sends the
15 right message, what amount tells these gentlemen, you shouldn't
16 have done it, don't do it again. And this is to send that
17 deterrent effect. That's why it's in there.

18 Likewise, the request for tip money is in there to
19 say, you're not supposed to take 5 percent of their tips and
20 give it to managers. And then you don't put it on the payroll
21 report because they're not allowed to have the money, they're
22 just taking it. If they were allowed, it would be on the
23 report, it would say *maître d's*, and the claim probably
24 wouldn't be in this case, because then there would be business
25 records that show, maybe they really are *maître d's*. But

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1 they're not. They're not *maître d's*.

2 So really in summary I just wanted to say, again, I
3 truly appreciate the time that you have taken for this case.
4 You've listened to a lot of witnesses. You've seen some
5 documents. The documents will be made available for you to
6 review. I think from a common-sense perspective, it's
7 reasonable that Ms. Ba says to you, he touched me, and if
8 you're asking me to quantify, I say 700. If she exaggerated
9 because it felt like 700, I don't think she should be penalized
10 for that. She says she was touched on many occasions. She has
11 told you where on her body she was touched. She's explained
12 the Christmas, New Year's party, in the restaurant, in the car,
13 with Mr. Blech. Ms. Veerman explained to you the requests for
14 dates and the touching. And the fact that both of these
15 gentlemen admit, admit interest in my clients, admit asking
16 them out, admit but water it down to say, well, I stopped.
17 Mr. Lesort says, I stopped after the dinner in my apartment.
18 Well, you stopped because she pulled your hand off her breast.
19 So maybe you stopped asking her out? I don't think he stopped
20 asking her out. But he makes it sound like the dinner didn't
21 go so well. I don't believe that. Mr. Blech says, well, in
22 fact we had a little thing, a little affair. I don't believe
23 that. There was no affair. She never reciprocated. She had a
24 boyfriend. She's allowed to have a boyfriend. But she doesn't
25 have to have a boyfriend called Mr. Blech. Mr. Veerman doesn't

1 have to make Mr. Lesort her boyfriend. Mr. Lesort may treat
2 Opia like his social life. That's where he finds his women.
3 But Ms. Veerman doesn't have to be one of them. And Mr. Blech
4 may decide to follow around, but Ms. Blech -- I'm sorry --
5 Ms. Ba doesn't have to go along with it.

6 And I thank you for your time. Look forward to the
7 end of this case, I'm sure, for everybody. I hope you enjoy
8 your lunch break, and, again, thank you.

9 THE COURT: All right. Thank you, Mr. Goldberg.

10 Ladies and gentlemen, I mentioned I had two brief
11 final instructions. I will give those now. When you begin
12 your deliberations, you should elect one member of the jury to
13 serve as your presiding juror, or foreperson. That person will
14 preside over the deliberations and speak for you here in court.
15 You are then to discuss the case among yourselves to reach an
16 agreement if you can do so. You must be unanimous in your
17 verdict. All eight of you must agree to it. Each of you has
18 to evaluate the case for yourself, but you should do so only
19 after you have considered all of the evidence and you have
20 discussed it fully with other jurors and, importantly, you have
21 listen to the viewpoints of your fellow jurors. Don't hesitate
22 to change your opinion if the discussion persuades you that you
23 should. On the other hand, don't come to a decision simply
24 because other jurors think it's right.

25 It's important, it's very, very important that you

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Charge

1 attempt to reach a unanimous verdict in this case. But of
2 course only if you can do so after having made your own
3 conscientious decision. Don't change an honestly held belief
4 about the weight or effect of the evidence simply to reach a
5 verdict.

6 If it becomes necessary during your deliberations to
7 communicate with me, then send a note out through the bailiff.
8 No member of the jury should attempt to communicate with me
9 except by a signed writing and I will answer the note, send it
10 back in, or else I will call you back out and answer it. I'm
11 not soliciting notes, but I told you repeatedly that everything
12 you need to decide the case you'll get here.

13 Now, one caveat. The evidence is all in. You can't
14 say we want to hear from some more witnesses or we want to see
15 some things that are not in evidence. You're stuck with what
16 the parties have presented at this point. But, on the other
17 hand, if you have a legal question about one of the
18 instructions or some question about the verdict form or there's
19 something that you think that we can assist you with, then by
20 all means don't hesitate to send out a note.

21 One thing. If you do send out a note, don't tell us
22 in the note how you stand numerically if you've taken some
23 ballots. We're never to know that. I think the thinking is,
24 if we know it's 7 to 1 or, you know, 4 to 4, that it might
25 affect how we answer the question. So don't tell us until you

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1 have reached a final verdict where you stand numerically.

2 There are four verdicts for you. They are fairly
3 self-explanatory. I want to give you just a moment with these.
4 The first verdict form deals with sexual harassment, has that
5 caption at the top, says, "On the claim that the plaintiffs
6 were subject to unlawful sexual harassment or were retaliated
7 against for opposing or objecting to sexual harassment, we find
8 in favor of," and then there's a caption as pertains to the
9 plaintiff Veerman. And you can check a box, either you find in
10 favor of her or you find in favor of the defendants, the
11 individual defendants and the restaurant, and then the company
12 that owns it. Only if you find in favor of the plaintiff do
13 you go on and complete the portions of the verdict having to do
14 with damages.

15 If you flip the form over -- this is the same verdict
16 form -- it has to do with sexual harassment -- then the caption
17 has to do with Ms. Ba. And again it has you check a box as to
18 who you find in favor of, whether Ms. Ba or the individual
19 defendants or the restaurant and the corporate defendant.
20 Again, only if you find in favor of the plaintiff, Ms. Ba, do
21 you go on and answer the questions about damages. And then
22 your foreperson signs it.

23 The format for the other verdicts is exactly the same.
24 There's one that deals with the claim of racial discrimination,
25 same thing. It's got the same captions. You follow the

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1 verdict instructions there, depending on how you find. If you
2 find in favor of the plaintiffs, then you go on for damages.
3 If you don't, you stop and your foreperson signs the form.

4 The third verdict form has to do with the alleged
5 misappropriation of gratuities. And again it's just simple
6 questions: Do you find that gratuities or tips were
7 misappropriated or not. If you do find that tips were
8 misappropriated, then there's a place to determine damages.

9 And then finally, fourth verdict, the single-page
10 verdict, has to do only with Ms. Ba. And remember, this is the
11 claim that she was discharged for opposing or disputing having
12 to pay the customer bill when allegedly a customer didn't sign
13 and left. Again, there's a place to sign. Whether you agree
14 with Ms. Ba or agree with defendants, you check the box. In
15 the event you find for Ms. Ba on this claim, then you calculate
16 damages.

17 So there should be at the end, once you've reached a
18 decision, there should be four signatures on here from the
19 foreperson. And then the form should be dated and the
20 appropriate boxes filled out. As I said, they are fairly
21 self-explanatory. You can kind of look at them and find the
22 dots.

23 We're going to send you these instructions. We're
24 going to send you the verdict forms. We're going to send back
25 with you all paper exhibits and photos that have been admitted

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1 in evidence.

2 You're probably hungry for lunch. Let me thank you
3 again, and you get started now with your lunch and your
4 deliberations. You may retire at this time to begin. Have
5 your lunch and begin deliberating.

6 I'm sorry. Swear the bailiff, please.

7 (Bailiff sworn)

8 THE COURT: OK. You may retire and begin your lunch
9 and deliberations.

10 (The jury retired to deliberate; time noted, 2:15
11 p.m.)

12 THE COURT: Have you examined each other's exhibits?

13 MS. FRIDEGOTTO: No, we have not.

14 THE COURT: OK. Time do that. I want to send these
15 things in right away.

16 MS. FRIDEGOTTO: OK.

17 THE COURT: They're undisputed at this point? Or are
18 we going to argue things that were admitted?

19 MR. GOLDBERG: I have a list of all the ones that were
20 stipulated in. If you want to double-check the list against
21 the --

22 THE COURT: I have that list myself.

23 MR. GOLDBERG: Should I read the numbers I have?

24 THE COURT: Well, let me read them to you. 1 through
25 5.

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1 MR. GOLDBERG: Yes.

2 THE COURT: Ms. Fridegotto, you may want to take this
3 note. 1 through 5, 7, 9, 10, 11, 12.

4 MR. GOLDBERG: That's right.

5 THE COURT: 14, 15, 16, 17, 18.

6 MR. GOLDBERG: That's right.

7 THE COURT: 20, 21. 22, 23, 24.

8 MR. GOLDBERG: That's right.

9 THE COURT: 27, 29, 30, 31, 34, 43-A, 43-B. Those are
10 the ones that were stipulated to.

11 Now, in --

12 MR. GOLDBERG: I move one more document.

13 THE COURT: Plaintiff's 3.

14 MR. GOLDBERG: 33.

15 THE COURT: OK. I show Plaintiff's 3 was admitted. I
16 don't know if that was one of the other ones.

17 MR. GOLDBERG: That's 33.

18 THE COURT: Defendant's A was admitted.

19 Ms. Fridegotto?

20 MS. FRIDEGOTTO: Excuse me?

21 THE COURT: Defendant's A.

22 MS. FRIDEGOTTO: A.

23 THE COURT: And you've culled out the ones that were
24 tagged?

25 MS. FRIDEGOTTO: Yes, I have, your Honor.

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1 THE COURT: Defendant's B was admitted, again, culling
2 out the ones that were tagged.

3 Plaintiff's 33 I show was admitted.

4 MR. GOLDBERG: Yes, that's right, your Honor.

5 THE COURT: Defendant's D and defendant's E-1 through
6 4 -- E-1, E-2, E-3, E-4, four photos.

7 MS. FRIDEGOTTO: Yes.

8 MR. GOLDBERG: That's correct.

9 THE COURT: And then Defendant's D I have received as
10 a photo taken at Opia.

11 Those are the ones that I show admitted. Is that what
12 you have too?

13 MR. GOLDBERG: Yes, your Honor.

14 MS. FRIDEGOTTO: That is correct. Can I just glance
15 through this packet?

16 THE COURT: Sure. Now, I think Ms. Fridegotto, I
17 think you said C. I didn't show C as one of the defendants's
18 exhibits that was admitted.

19 MS. FRIDEGOTTO: It's the article that you had me
20 redact, your Honor.

21 THE COURT: OK. That was the -- yes, I apologize. I
22 should have had that there.

23 OK. I think that's it. So, Mark, as soon as
24 Ms. Fridegotto has looked at those, if you will -- she has hers
25 organized, take plaintiff's and her exhibits, put them with

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1 that and take it in to the jury.

2 THE CLERK: Yes.

3 THE COURT: Is there anything else before we recess?
4 Anything else on behalf of the plaintiff?

5 MR. GOLDBERG: No. I was just waiting for
6 Ms. Fridegotto to finish.

7 THE COURT: OK. Ms. Fridegotto, anything else on
8 behalf of the defendant?

9 MS. FRIDEGOTTO: No. Thank you.

10 THE COURT: OK. Do all parties agree that the jury
11 instructions were read as agreed upon and correctly?

12 MR. GOLDBERG: Yes, your Honor.

13 THE COURT: Ms. Fridegotto?

14 MS. FRIDEGOTTO: Yes, your Honor.

15 THE COURT: OK. We're in recess.

16 MS. FRIDEGOTTO: I give these to?

17 THE COURT: To the clerk, to my law clerk. He will
18 take them back with the verdict form and the instruction.

19 Folks, as you can see -- I say this to the counsel, if
20 you can stay within about ten minutes and make sure that the
21 clerk has your cellphone numbers?

22 MS. FRIDEGOTTO: Yes.

23 MR. GOLDBERG: We're going to stay, going to go
24 downstairs to the eighth floor.

25 THE COURT: That's fine. Make sure that Mr. Lopez has

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1 your cellphone numbers so that we can reach you if there's a
2 question or a verdict.

3 MR. GOLDBERG: We have no phone, but we'll check back
4 in half an hour.

5 MR. MARGOLIS: The cellphones are confiscated.

6 MS. FRIDEGOTTO: Not if you get the ID. I told you to
7 get the ID.

8 MR. GOLDBERG: Ours are at the security desk, but
9 we'll check back in half an hour if that's OK.

10 MS. FRIDEGOTTO: I'll call you.

11 THE COURT: OK. Otherwise you'll be on the eighth
12 floor?

13 MR. GOLDBERG: In the cafeteria.

14 THE COURT: OK. So ten minutes away.

15 MR. GOLDBERG: Thank you, your Honor.

16 (Jury present; discussion held off the record)

17 THE COURT: We're back on the record. The jury is
18 present. Counsel and the plaintiffs are present. You have
19 sent me a note, ladies and gentlemen. "Please check that all
20 the exhibits we have are in evidence. Thanks."

21 The answer is yes. The counsel went over all the
22 exhibits, made sure before they went back there that everything
23 you have was admitted into evidence.

24 What may be the source of confusion is this: I don't
25 know if you remember, but on Friday, as Mr. Goldberg began his

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1 case, he stood up and said, Judge, pursuant to a stipulation of
2 the parties; these exhibits are going to be admitted into
3 evidence. We have agreed that they are reliable. You don't
4 have to bring in -- a lot of times if it's a business record or
5 something, you have to bring in somebody that made the record
6 that tells you about how it was made. In this case, both
7 counsel had gone over all of the exhibits that Mr. Goldberg
8 read into the record. They agreed that those exhibits could be
9 authenticated. And so to respect your time and speed the trial
10 up, they said, we won't go through calling witnesses just to
11 say that, yes, this is a record and I recognize it as such.
12 We'll agree or stipulate that these may be admissible.

13 The source of confusion may be, some of the exhibits
14 that were admitted pursuant to that stipulation -- there was a
15 long list of them, maybe 20, 25 -- may not have been expressly
16 referenced during the trial. So you may think, well, no one
17 ever said anything about this, what are we doing with this?
18 They were admitted pursuant to agreement of the parties because
19 the parties think they have some relevance to the issues you
20 are to decide. That ultimately is up to you, to decide whether
21 they have any relevance or not. But I am speculating here a
22 little bit. I think that's the source of the confusion. Maybe
23 you've seen some documents and said, nobody ever said anything
24 about this in the course of trial. What are we doing with
25 this? Am I right about that, is that?

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1 JUROR NO. 8: Your Honor, Bob actually had --

2 JUROR NO. 2: I think that's correct, your Honor, yes.

3 THE COURT: OK. Does that answer the question, then?

4 JUROR NO. 2: I think it does.

5 THE COURT: Because I gave, before I sent the exhibits
6 in, both sides had a chance to go over each other's exhibits,
7 make sure that they were admitted into evidence. They
8 confirmed for me that everything that went back there had been
9 admitted into evidence. So you may consider everything that's
10 back there. It's all been received in evidence. It's all part
11 of the evidence in this case. Whether or not it got any
12 express play during the course of the presentation and the
13 testimony, you're free to consider it.

14 JUROR NO. 3: OK.

15 THE COURT: OK?

16 JUROR NO. 2: Thank you.

17 THE COURT: That resolves it?

18 JUROR NO. 2: I think it does.

19 THE COURT: OK. You may continue your deliberations.

20 JUROR NO. 1: Thank you.

21 (Jury deliberations resumed)

22 THE COURT: All right. The jury has left. Counsel,
23 plaintiffs are here. I think that completes it. The fellow
24 speaking, Mr. Docherty, is that his name?

25 MR. GOLDBERG: I believe so.